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EXAMINING THE ADEQUACY OF WORKPLACE PARENTAL RIGHTS IN GREAT BRITAIN

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EXAMINING THE ADEQUACY OF WORKPLACE PARENTAL RIGHTS IN GREAT BRITAIN

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PH.D

ABSTRACT

This thesis examines the adequacy of the current regime of parental rights in the workplace in Great Britain. This is done by first considering the rationale for protecting the status of parents and why it is important to enable parents to combine both family and work responsibilities and considers feminist theory in relation to this subject. Having done so, the thesis moves on to consider the existing legislative framework that is supposed to achieve work-life balance focussing on the following legislative provisions:

- Maternity and paternity leave
- Parental leave
- Emergency Dependant's leave
- Right to request flexible working
- Part-time Workers (Prevention of Less Favourable Treatment) Regulations
- Working Time Regulations
- Sex discrimination

The thesis then considers the way in which "family-friendly" rights are enforced through the Employment Tribunal system, including some of the hurdles faced by potential claimants, such as tribunal fees.

Finally, the thesis looks to the future, considering whether the Shared Parental Leave provisions, which apply for children expected on or after 5 April 2015 will address the problems identified earlier in the thesis with the current legislative regime and suggests a new, more holistic approach to the need to combine work and family, based on the duty to make reasonable adjustments, which currently exists only in respect of disability.

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Turning Point Scotland v Perry UKEATS/0049/11
Tyson v Concurrent Systems Inc Ltd EAT/0028/03
Unegbu v Newman Stone Ltd UKEAT/0157/08
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Uzoechina v Immigration Advisory Service EAT/0992/02, EAT/0108/03
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Vaughan v Lewisham LBC [2013] I.R.L.R. 713
Vaughn v Liverpool City Council EAT/344/99
Vaughan v London Borough of Lewisham and others UKEAT/0533/12,
Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871
Verma v Harrogate & District NHS Foundation Trust UKEAT/0155/09
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Why v Enfield Grammar School ET/3303944/2011;
Wippel v Peak, C313/02, [2004] ECR I-9483
Wolff v Kingston upon Hull City Council UKEAT/0631/06

Woodcock v Primary Care Trust [2012] EWCA Civ 330

Zaiwalla & Co v Walia [2002] IRLR 697

CHAPTER 1 : The problems confronting working parents and why these are of importance to society as a whole

1.1 Scope of thesis

1.1.1 The purpose of my thesis is to consider the adequacy of workplace parental rights in Great Britain ("GB"). I will argue that the rights that the law in GB currently provides to allow parents to combine both their work and family responsibilities fail to produce the desired outcome (i.e. to allow parents to combine work and family) and will then propose changes to the current law. It should be noted at the outset that some of the statistics that are gathered in relation to this area relate to the UK, rather than GB specifically as only UK statistics were available in some cases. The law, figures and statistics set out herein are accurate as at 1 March 2015.

1.1.2 Why is the workplace important? As Caracciolo Di Torella and Masselot have noted "[e]mployment is not only important because it contributes to the maintenance of society's overall economy, but also because it gives individuals their main source of income and wealth; by means of employment individuals achieve social security and financial independence which allow them to make choices. In turn, the possibility of making choices brings freedom."¹

1.1.3 There is also another aspect to work; we spend a vast amount of time in the workplace and therefore it is also the site of a large number of our social interactions and where we form social connections. As such any barriers to work, or particular types of work, can have a huge impact on the individuals concerned, both from a financial and social perspective. GB employment law is based on the law of contract and, as such, the general principle is that the parties are free to negotiate such terms as they wish. There are some limitations set out in the legislation, such as the fact that, from a statutory perspective, an employee who has the relevant qualifying service² cannot be unfairly dismissed³. However, such legislation does not prevent an employer from terminating

¹ Eugene Caracciolo Di Torella. and Annick Masselot (2010) *"Reconciling Work and Family Life in EU Law and Policy"*, London: Palgrave Macmillan, 17

² Two years for those whose employment commenced on or after 6 April 2012, one year for those whose employment commenced before this date.

³ An employer can only "fairly dismiss" an employee where the dismissal is on one of four specified grounds set out in s98(1) of the Employment Rights Act 1996 (redundancy, capability, conduct, illegality) or where the dismissal was for some other substantial reason, and, even then the dismissal must be fair considering whether in the circumstances (including the size and administrative resources of the employer's undertaking)

the employment relationship; it simply provides the employee with a remedy (usually financial) after the termination.

1.1.4 It is important to note at the outset of this thesis that rights in employment are just part of the solution for enabling parents to combine work and family; good quality, affordable childcare is also vital and there is an obvious and recognised⁴ lack of this in GB. The average cost of childcare is 28% of household income⁵ – this is the highest in Europe, other than Switzerland and can be contrasted with, for example, Sweden where the level is just 6%. A parent buying 50 hours per week of childcare (which equates to a full-time nursery place) would face an average bill of approximately £11,000⁶. By contrast median gross annual earnings are £27,000 (which equates to net earnings of around £22,000). As such, childcare costs are a significant expenditure for most parents. This has an impact on whether some parents can afford to work. As Crompton has noted “...the cost of ‘good’ childcare service, and the low quality of less expensive childcare provision, means that for many working-class families, good quality childcare can only be assured if it is provided by the mother...”⁷. This is problematic for several reasons: (i) the ability to participate in paid employment is important for women because it has the capacity to provide them with economic independence; (ii) as discussed later in this thesis, increasingly, men want to actively participate in childcare responsibilities. Where parents want (or for economic reasons, need) to adopt a dual carer structure, the current workplace norms and the rights designed to assist them to reconcile work and family responsibilities, do not allow them to do so. Changing the working patterns of workers, as well as expectations in relation to the normative worker (discussed in Chapter 2) would assist parents in better being able to reconcile work and family responsibilities, particularly those with school-age children.

the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.

⁴ For example, this issue was debated in both the House of Commons (19 November 2013) and the House of Lords (9 January 2014).

⁵ OECD (2011) “Doing Better for Families”, 27 April 2011.

⁶ These costs are even higher in London, where a parent will pay, on average, £14,000 for 50 hours of childcare. Briefing from the Family and Childcare Trust, “Increasing access to affordable childcare debate”, House of Lords, 9 January 2014 (available from www.daycaretrust.org.uk)

⁷ Rosemary Crompton (2006), *Employment and the Family: The Reconfiguration of Work and Family Life in Contemporary Societies*, Cambridge: Cambridge University Press, p182

1.1.5 I would also highlight that in my thesis I am examining those rights that are provided to parents; adoptive parents will also have similar or equivalent rights, and whilst I note where there are equivalents (or where rights extend to adoptive parents) I do not examine whether such rights are sufficient to deal with the particular issues which may arise through adoption due to the relatively small number of parents affected by these issues.

1.1.6 Throughout the thesis, I argue that the current employment rights afforded to parents are not sufficient to enable them to reconcile work and family responsibilities. As I demonstrate in Chapter 2, this is because there is a lack of a theoretical framework underpinning the current rights regime and the theories underpinning the individual rights are not appropriate to meet the needs of parents. In Chapters 3 through to 5, I consider the current rights and demonstrate in detail how these fail to meet the needs of parents. Chapter 6 presents the argument that the current enforcement mechanisms, with their emphasis on individual enforcement and the adversarial (as opposed to inquisitorial) nature of the Employment Tribunal system makes it extremely difficult for many individuals to seek redress when their rights are violated. Having shown that the current rights are not sufficient to allow parents to reconcile work and family responsibilities, I develop an alternative approach based on the new theoretical framework I advocate in Chapter 2. This includes a duty to accommodate parental responsibilities.

1.2 Parenting as a gender issue?

1.2.1 The question of whether parents are able to combine work and family also gives rise to gender issues. Whilst both parents are equally capable of caring for a child, it seems to be accepted in GB that women are the primary carers for children⁸; as such, any difficulties in combining work and family are, generally, likely to be felt most severely by

⁸ It is, however, interesting to note that there are no official statistics on the numbers of women in the UK that have (or consider that they have) primary carer responsibilities for a child. Such details could previously be derived from time-use surveys that were undertaken by the Office for National Statistics ("ONS"). The most recent of these was conducted in 2005. It seems unlikely that there will be a further time use survey in the immediate future as in a statement issued by the ONS, it has said that it "...has not committed to spending any money on running a further time use survey..." (<http://www.ons.gov.uk/ons/media-centre/statements/time-use-surveys.html>).

women. As Crompton has noted “[a]s individuals, women may be seen as equal in the sphere of employment, but normative constructs still allocate the major responsibility for care to women...”⁹ For this reason the difficulty with reconciling work and family responsibilities is an issue of gender.

1.2.2 Care responsibilities for children are predominantly undertaken by women due to the ideology of motherhood (discussed in Chapter 2). As James has noted, the ideologies of motherhood and fatherhood “...are powerful influences about ‘proper behaviour’ in relation to decisions about who will provide unpaid childcare and who will participate in paid employment...”¹⁰ Smart has considered the history of motherhood, noting that the institution of motherhood has emerged “...with the rise of late modernity...”¹¹ and that historically “...everything a child was granted was treated as coming from the father.” Essentially, in law, at least, the mother was irrelevant or invisible and mothers had no rights.¹² The emergence of the legal institution of motherhood “...was in part a result of political struggle by early feminists who were able to use the ideology of motherhood to try to gain more rights in the nascent family law of the day.”¹³ This meant that motherhood was portrayed as being “... a source of women’s strength and uniqueness, a site that is entirely feminine and that draws upon women’s special qualities and knowledge.”¹⁴ Whilst the aim of securing rights for mothers was admirable, the way in which the change to the law in one area had a negative impact on others is one of Smart’s concerns about the recourse to the law. This is discussed below. In particular, the ideology of motherhood has resulted in mothering being viewed as a natural state for women. A consequence of this is the idea that the care of children should fall to them because they are naturally suited for this task.

⁹ Crompton (n7), p85

¹⁰ Grace James (2009) ‘Mothers and fathers as parents and workers: family-friendly employment policies in an era of shifting identities’ *Journal of Social Welfare and Family Law*, 31 (3). pp. 271-283, 272

¹¹ Carol Smart (1996) ‘Deconstructing motherhood’, in E. Silva (ed.) *Good Enough Mothering? Feminist Perspectives on Lone Motherhood*, London: Routledge, p44

¹² Smart and Brophy (1985) ‘Locating law: a discussion of the place of law in feminist politics’, in Brophy J and Smart C (eds), *Women in Law*, London: Routledge

¹³ Smart (n11), p45

¹⁴ Smart (n11), p38

1.2.3 In contrast, fathers have been held to a very different standard in relation to their responsibilities for their children. As James has noted “[t]he dominant ideology of fatherhood focuses on his role as provider and protector...and often excludes or finds him inadequate in a care-giver role...”¹⁵ Because of the emphasis on the breadwinning role of the father, anything that detracts from this, for example, taking time off work to care for a child, may negatively impact on the perception of whether a father is meeting his obligations (as determined by the ideology of fatherhood). The EHRC’s “Working Better”¹⁶ report notes that “...the promotion of active fatherhood may well be crucial in removing the obstacles that prevent women achieving their full potential at work.” However, until the imbalance in who is responsible for caring for children is corrected any disadvantage connected to these responsibilities will inevitably have a greater effect on women than on men.

1.2.4 A mother’s caring role affects how much time she has to spend in employment. As I set out below, this affects the type of roles that mothers are able to perform in the workplace (in part due to the normative standards expected of workers, discussed in Chapter 2) with those roles requiring long working hours being inaccessible. Caracciola di Torella and Masselot have noted that “[o]nce mothers start undertaking the main share of childcare, they also start competing on an unequal footing in the employment market, thus reinforcing gender segregation and pay gaps.”¹⁷ This can be seen in relation to how much time mothers have available to work after the time spent caring for their children has been taken into account as compared to how much time men have available. A time use study carried out in 2005¹⁸ showed that women, on average, spend 32 minutes per day caring for their own children with 21% of women participating in childcare, whereas men spend less than half of this (15 minutes per day) with only 11% of men participating in childcare. Although these figures seem low, this is because they are averaged across all adults including those who have no dependent children; those with dependent children spend far longer than this each day caring for their children. This can be seen

¹⁵ Grace James, (2009) *The legal regulation of pregnancy and parenting in the labour market*. London: Routledge, p16

¹⁶ “*Meeting the Changing Needs of Families, Workers and Employees in the 21st Century*”, EHRC, March 2009

¹⁷ Caracciola di Torella and Masselot (n1), 79

¹⁸ “*The Time Use Survey: 2005*”, Deborah Lader, Sandra Short, Jonathan Gershuny, ONS, 31 August 2006

from the figures on caring, which show that those (both men and women) with dependent children aged up to four spend on average 136 minutes per day caring for their children (as the primary task), with 76% participating in this childcare. These figures do not, assist with showing the gender division in caring, but we can estimate the division of childcare from the first set of data. By extrapolating the data, we can estimate that amongst those with children aged up to four, women will spend 185.1 minutes (over three hours) per day on childcare, whilst men will spend 86.9 minutes (under an hour and a half) per day on this¹⁹. When we consider these demands in the context of the length of the working day, the conflict between work and family, particularly for women, becomes apparent.

1.2.5 Full time workers work on average 42.7 hours per week, though hours vary according to the role done by the employee. The 2005 time use study also shows that managers and senior officials work the most hours (46.2 hours per week). These roles are more likely to be occupied by men (ONS statistics show that the proportion of managers who are women is 34.8%²⁰). By comparison, those in personal service and administrative and secretarial roles work the least hours on average (38.4 and 38.5 per week respectively). These are roles that are dominated by women (77% of administrative and secretarial roles 82% of personal service are held by women²¹). This gender division between roles cannot be accounted for by qualifications: 44% of women in work are graduates who have achieved a qualification higher than A levels, compared to 38% of men²². As de Silva de Alwis has noted, “[w]omen tend to self-select work that allows them to balance [their] dual roles [of childcare and work]”²³. Combining a role which requires an average of 46.2 hours per week with childcare which, based on an average of three hours per day, equates to fifteen hours in a five day working week, is self-evidently far more difficult than combining a role requiring 38.5 hours per week with fifteen additional hours.

1.2.6 Cunningham-Parmeter suggests that “[w]omen will not achieve full workplace equality until men do more at home, and men will not enter the domestic sphere if they

¹⁹ Annex 2 sets out the underlying calculations.

²⁰ “*Women in the Labour Market*”, ONS 2013 Release, 25 September 2013

²¹ *ibid*

²² ONS (n20)

²³ Rangita de Silva de Alwis “Examining Gender Stereotypes in New Work/Family Reconciliation Policies: The Creation of a New Paradigm for Egalitarian Legislation”, 18 *Duke J Gender L & Pol’y* 305 (2010-2011)

continue to face employment retaliation for doing so."²⁴ This is true. Until the issues that deter men from being more involved in domestic tasks, including childcare, are resolved, men are unlikely to choose to do more. Yet at the same time it is vital for gender equality that men do spend more time caring for their children so that the burden of childcare can be more equally shared²⁵.

1.2.7 Given the unequal division of childcare responsibilities, if we are to secure gender equality, we need to ensure that the work sphere is supportive of childcare responsibilities for both women and men. This means that simply providing access to employment for working parents, without other measures, is not sufficient. The current situation, which can be summed up by the quote "...working mothers are welcome to remain in the workforce but so long as they keep their caring from interfering too much"²⁶, is entirely unsatisfactory. Changes need to be made so that those who may, on occasion, need time off to care for their children, or who wish to adopt non-typical working arrangements (e.g. flexible working, home working, etc), are not unjustifiably disadvantaged. As I argue in Chapter 2, this would require a change to the normative standards of a worker.

1.2.8 Longer-term, the aim should be for both parents to equally bear responsibility for the care of their children. Caracciolo Di Torella is correct that the current "family-friendly" policies do not assist. This is because these policies "...de facto continue to promote the idea of the mother as main carer: they are not geared towards promoting equal parenting or gender equality but simply at 'valuing' mothers' work..."²⁷ This is the case even where policies are expressed to be gender-neutral. (I consider this issue in greater detail when I analyse the current gender neutral rights designed to reconcile work and family responsibilities in Chapter 4.) Unless such policies or rights address the

²⁴ Keith Cunningham-Parmeter, "Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination", 24 *Colum. J. Gender & L.* 253 (2012-2013), 257

²⁵ There is also the issue of other domestic work which seems to fall disproportionately on women, see for example Man Yee Kan, Oriel Sullivan and Jonathan Gershuny "Gender Convergence in Domestic Work: Discerning the Effects of Interactional and Institutional Barriers from Large-scale Data" *Sociology*, April 2011: 234-251 which suggests that women still undertake the bulk of routine housework and spend 280 minutes per day on this (including care) compared to 148 minutes per day for men. These issues are outside the scope of my thesis.

²⁶ Laura Oren, "Honor Thy Mother? The Supreme Court's Jurisprudence of Motherhood", 17 *Hastings Women's LJ* 187 (2006), 219

²⁷ Eugene Caracciolo Di Torella (2007) 'New Labour, new dads - the impact of family friendly legislation on fathers', *Industrial Law Journal* 36: 316-326, 328

structural barriers to men using them (in terms of pay and concern about detriment), then they are likely to continue to be used predominantly by women. As Collins has noted “...granting parents equal shares in parental leave, for example, means little choice for a couple with big differences in earning and career potential. Until men can take an equal share in the work of child-care and home life without financial or employment prejudice to either partner, they will not do it and women will be scorned for expecting them to.”²⁸ It is therefore vital that we remove any unreasonable disadvantage that parents incur as a result of their caring responsibilities. As I argue in the rest of this thesis, the current rights that parents have in the workplace are not sufficient to achieve this.

1.3 Difficulties facing those combining work and family responsibilities

1.3.1 In this section, I will argue that caring for a child has an impact on whether mothers are able to undertake senior management roles and affects the amount that they are paid for the work that they do. Whilst fathers as well as mothers, can undertake the care of children, currently, this responsibility is generally borne by mothers and thus when I am considering difficulties of reconciling work and family, I will use the term ‘mothers’ rather than parents, because this reflects the reality of who actually provides care for children. That is not to say that there are not some fathers who do spend significant amounts of time caring for their children, or who are the primary carers, but they are in the minority.

Senior management

1.3.2 The low levels of women in senior management roles provides some evidence of women’s disadvantage in the workplace. A significant cause of this relates to their childcare role because, as discussed in Chapter 2, childcare responsibilities are incompatible with the worker norm. Further, certain roles, such as those frequently found in senior management, require such long hours that they are incompatible with childcare responsibilities.

²⁸ Hugh Collins, (1994) *The EU Pregnancy Directive: A Guide for Human Resource Managers*, Blackwell: Oxford (UK) and Cambridge (USA)

1.3.3 Whilst women comprise approximately 49.4% of the workforce of the UK²⁹, they are significantly under-represented at the highest levels of management: of the directors of FTSE 100 boards only 12.5% are women. The Davies Report³⁰ was commissioned to look into the reasons behind this and found that there was a fundamental "pipeline" issue: not enough women are reaching senior management levels (and thereby that there is an insufficient pool of women with the requisite experience to undertake director level duties). The Report acknowledges that the reasons for this include factors such as "lack of access to flexible working arrangements" and "difficulties in achieving work-life balance".³¹ There are no statistics available on how many hours on average a typical CEO or executive director works, but a *Guardian* article published in 2013 suggests that many CEO's work significantly in excess of 60 hours per week³². A role requiring this amount of hours is impossible to reconcile with responsibility for childcare. This affects women more severely because of the number of hours they spend on this as discussed previously. Taking into account the discussion above at 1.2.4 regarding the amount of time mothers spend caring, it is unsurprising that there are so few women in these roles. Where women do undertake senior management roles there is evidence that suggests that they do so only by relinquishing their primary care roles. Zweigenhaf and Domhoff have noted that some³³ of the few women who have made it to become CEOs of Fortune 500 companies "...indicate that they have only been able to be successful in their careers because they have had husbands who have been willing to...provide primary care for their children."³⁴ If mothers are not able to combine work and family responsibilities in senior roles, then they are effectively forced out of these roles unless there is another parent willing to take on the role of primary carer for the children. If, however, there was effective legislation enabling the reconciliation of work and family responsibilities, the number of women in

²⁹ GMB Research, "More Women in Jobs", 9 February 2011

³⁰ Lord Davies "Women on Boards", Department for Business, Innovation and Skills, February 2011

³¹ *ibid*, p16

³² Tim Dowling, Laura Barnett and Patrick Kingsley, "What time do top CEOs wake up?" 1 April 2013

³³ The number of women who indicated this is not stated, however there were only 16 women in the sample who had children (out of 28 female CEOs). From the language used ("a few"), it follows that at least two must have indicated this (which would be 12.5%)

³⁴ "The New CEOs: Women, African American, Latino and Asian American Leaders of Fortune 500 Companies", Rowman & Littlefield Publishers, 16 July 2011, p29

these senior management positions would seem likely to increase (although, because of the pipeline issue, it might still take some time for the impact of this to be seen).

Women's presence in the boardroom has been shown to have an impact on the performance of a company with studies by both Catalyst³⁵ and McKinsey³⁶ showing a correlation between an increased number of women on the board of directors and increased company performance. However, this is not just about ensuring that we have women on boards; in order for women to have the requisite skills to undertake these roles, they must have progressed through management. Therefore there needs to be a lower rate of female attrition from the UK workforce. As the Davies report notes, male and female graduate entry into the workforce is relatively equal, with the male/female gender split continuing to be equal at junior management positions, only for a marked divide to occur at senior management levels³⁷. One of the reasons for the current high rate of female attrition from the workforce is the problems that women face when they assume caring responsibilities, such as a lack of flexible working arrangements and issues around work-life balance. The response to the call for evidence by the Davies report³⁸ supports this, showing that 20% of respondents felt that the reason for under-representation of women at board level was issues with maintaining work/life balance, and 12% around maternity issues/maternity leave; this shows a third of respondents attributed low levels of female board representation as due to problems which only occur when women assume caring responsibilities³⁹.

Equal Pay

1.3.4 As I argue below, pay inequality between the sexes is, in part, as a result of mothers' childcare responsibilities. Equal pay legislation has been around for over 40 years, yet there still exists a gender pay gap (based on hourly pay rates) of just over 10% for full time female workers⁴⁰ (as compared to male full time workers) and just over 38%

³⁵ *"The Bottom Line: Corporate Performance and Women's Representation on Boards (2004–2008)"*, Catalyst, 1 March 2011

³⁶ Desvaux, Devillard-Hoellinger, Baumgarten, *"Women Matter: Gender Diversity a corporate performance driver"*, McKinsey & Company, 2007

³⁷ Davies (n30)

³⁸ Davies (n30)

³⁹ Davies (n30)

⁴⁰ According to Annual Survey of Hours and Earnings (2014 Provisional Results) from the ONS ("*2014 ASHE*"), women working full-time earn, on average, £12.31 per hour, compared to men who earn £13.72.

for part-time female workers⁴¹ (as compared to male full time workers). The latter rate reflects the fact that, as discussed later in this thesis, part-time work (for both male and female workers) tends to be low-paid, low-value work. This issue and the extent to which the relevant legislation in this area is able to tackle this issue is considered in Chapter 4. Pay inequality between the sexes is both a reason why women tend to bear the greater responsibility for childcare and a result of women bearing this responsibility. Women bear responsibility for childcare because where time off is poorly paid or unpaid (as most of the current rights, discussed in Chapter 3, are) in a 2 parent household, the parent earning the lower wage, typically the mother, is more likely (for economic reasons) to take time off than the higher (male) earner. Women are penalised for their caring responsibilities because these often mean that they cannot conform to the (male) worker norm, discussed in Chapter 2. As a result, their contributions to the workplace are viewed as less valuable. Pay inequality is then exacerbated because some women are forced in part-time work, which tends to be low paid and low value.

1.3.5 Research into the gender pay gap has shown that there are a number of factors responsible, not only the so called “motherhood penalty”. However many argue that one of the most significant factors contributing to the gender pay gap is “women’s traditionally greater involvement in child-rearing”.⁴² Research by Walby and Olsen⁴³ has shown that the three most significant factors (in terms of the percentage to which they contribute to the pay gap) are: being female (38%), lack of full-time work experience (18%) and interruptions to employment for childcare or other family care (14%). Of particular note in relation to the latter was the finding that interruptions to employment “...had a substantial negative association with wages over and above their effect on reducing years

⁴¹ According to 2014 ASHE, women working part-time earn, on average, £8.46, compared to men working full-time, who earn, on average, £13.72 per hour ($\text{£8.46}/\text{£13.72} = 0.6166$)

⁴² Patricia McDowell “*The Gender Pay Gap in Context: Causes, consequences and international perspectives*”, March 2010, Office of the First Minister and Deputy First Minister (Northern Ireland); similarly the TUC acknowledges that the “...interconnectedness of part-time work, occupational gender segregation and the onset of family responsibilities hits women in the UK particularly hard...” (“Closing the Gender Pay Gap: An update report for the TUC Women’s Conference 2008”) and the Fawcett Society attributes one of the reasons for the gender pay gap as being the lack of flexible working, long hours culture and negative attitudes and discrimination as a result of women’s caring responsibilities (<http://www.fawcettsociety.org.uk/index.asp?PayeID=321>)

⁴³ Olsen, Walby, 2004, “Modelling Gender Pay Gaps”, *EOC Working Paper Series* No.17.

of full-time employment experience..."⁴⁴, that is, that there was a penalty associated with these interruptions that was in excess of the amount of time out of the workplace. Lack of full-time work experience may not immediately seem to be related to childcare responsibilities; however, women may be forced to work part-time where either their roles provide no flexibility to allow them to combine work and family responsibilities or where there is no suitable childcare to enable them to work on a full-time basis. Where this occurs, as discussed further below at 1.5.20, often the part-time roles that women are forced into by virtue of their childcare responsibilities are roles with lower status and lower pay than they had enjoyed whilst employed in a full-time role. If the law were to properly enable parents (and not just mothers) to be able to reconcile work and family responsibilities, this could have a significant impact on the gender pay gap. As mentioned above, one of the problems facing women with care responsibilities is their inability to conform with the male worker norm (which results in them being categorised as less valuable to an employer and consequently justifies them receiving lower levels of pay). One way to change this norm would be for childcare responsibilities to be more evenly divided between men and women. Whilst there remain penalties for participating in childcare, men are unlikely to choose to more evenly divide these responsibilities; removing these penalties might convince more men to do so. Men would then have responsibilities that would affect their ability to conform with the current norm, so the norm could no longer represent what was considered to be "normal" in the workplace. If the norm was then to be recreated, with caring responsibilities taken into account, women's contribution in the workplace would conform with this and there would be no basis on which their contributions could be seen as less valuable. However, this would require a change in the way in which men and women divide their domestic responsibilities, which involves societal change. This leads us to the question of what the role of law is in this issue.

⁴⁴ *ibid*, p29

1.4 The role of law

1.4.1 This thesis considers the issue of whether the legislation in GB is sufficient to enable parents to combine work and family responsibilities. Yet, as will be seen in Chapter 2, part of the issue is about how society views parenting and how much value is placed on this. This does not appear then, to be an issue for law alone, so what is the role of law here? Smart has expressed doubt about the usefulness of a resort to law. Her worry is that "...the law is so deaf to core concerns of feminism that feminists should be extremely cautious of how and whether they resort to law."⁴⁵ Although these concerns were expressed 25 years ago, there is no reason to think that they are completely obsolete. Legal institutions remain predominantly male (74.8% of the judiciary are male⁴⁶), as is the legislature (in Parliament: of 650 MPs, only 143 are female)⁴⁷. Legislation that was passed decades ago to address gender inequality in the workplace (the Equal Pay Act 1970 ("EqPA") and the Sex Discrimination Act 1975) has not fully addressed the problem, although there has been some progress. Law has been able to secure some wins for feminism: as discussed in Chapter 5, direct sex discrimination is now unusual (and is socially unacceptable) and the gender pay gap has reduced from 28.7% when the EqPA came into force in 1975⁴⁸ to just over 10% in 2015. But, the worker norm does not appear to have been affected by any of the legislative measures: it remains a full-time (male) employee unencumbered by any responsibilities. This fundamental aspect of employment law needs to change if there is to be further progress. The fact that it has not, to date, despite a raft of legislative interventions, may be because of the law's deafness to the central concerns of feminism. The deafness that Smart speaks of may also be seen in some of the unintended consequences of legislation intended to assist women. Legislation discussed in Chapter 2 designed to protect women from unsafe work environments has been used to justify keeping them out of certain roles and workplaces. We need, therefore, to be careful about the impact that possible legal reforms may have. However, just

⁴⁵ Carol Smart, (1989) *Feminism and the Power of Law*, London: Routledge, p2

⁴⁶ "Judicial Diversity Statistics 2015", Judicial Office Statistics Bulletin, 30 July 2015

⁴⁷ Following the 2015 election, there were 191 female MPs (Richard Keen, "Women in Parliament and Government", 19 June 2015, House of Commons Library)

⁴⁸ "Economic & Labour Market Review", Vol 2, No.4, April 2008, ONS, Debra Leaker

because the law does not always appreciate feminism's central concerns does not mean that we should not try to use it as a tool. MacKinnon has argued that we do not have to trust that law will behave in a feminist way to use it as "[i]f women are to restrict our demands for change to spheres we can trust, spheres we already control, there will not be any."⁴⁹ This is true; we need to use a range of tools to try to advance women's position in the workplace and law is one of these tools. However, a wealth of legislation is in place already to resolve the difficulties in reconciling work and family responsibilities. This legislation though, as I aim to demonstrate throughout this thesis, is failing to meet the needs of parents. The problem with the laws that we currently have that are designed to facilitate combining work and family responsibilities is that they are premised on one particular conception of how a family is run: with women taking the predominant share of childcare, which reflects the ideology of motherhood (discussed in Chapter 2). Families need to be free to determine how to care for their children. James has recognised that legal intervention alone will not change the division of family responsibilities. However, as she also recognises "...law can improve the choices on offer..."⁵⁰ for both mothers and fathers. There appears, therefore, to be a role for law to play in assisting parents to be able to reconcile their work and family responsibilities.

1.5 Justification for protection of pregnancy and childcare

1.5.1 So far I have argued that childcare is an issue that is important for gender equality. In this section I consider the other reasons why pregnancy and childcare should be accommodated and protected in the workplace. In doing so, I first wish to address one issue which is often cited in support of there being no special protection or accommodation of parental responsibilities: the idea that having a child and caring for it is a lifestyle choice.

⁴⁹ Catharine MacKinnon (1987) *Feminism Unmodified: Discourses on Life and Law*, Cambridge, Mass: Harvard University Press, p228

⁵⁰ James (n10), 278

The idea of choice

1.5.2 Pregnancy is often acknowledged to be a social good. This is because, in order for society to continue to function, we need children who will grow up to be doctors, nurses, teachers, or work in the fire, police or ambulance services and so forth. If we stopped having children, the world would eventually grind to a halt because there would be no one to look after things when we all get old and are incapable of doing so ourselves. Further, our benefits and tax systems rely on those of working age to contribute so that services, such as health, police, can be provided by the State. As such, it is vital that people continue to have children.

1.5.3 If a woman has a child, there is then a need for someone (or a group of people) to bring up that child; "[a]t its most basic level, care is crucial for perpetuation of the species through the nurturing of infants and beyond..."⁵¹. As I argue below at 1.5.16, there is evidence that parents have a significant impact on the way that their children develop and, in particular, on their behaviour. Further, for the reasons set out below, society as a whole benefits from parents being able to spend time with their children. As such, parents have a responsibility to care for their children and provide them with appropriate levels of attention. It is also not desirable or possible to outsource the care of a child to a third party (for example, a nanny); there will almost always be a need for parental care in relation to certain tasks. I agree with Crompton that "...it does matter who reads a bedtime story to a child, or shares in the activities of day-to-day life...Caring, in short, conflates labour and love...these unique and particular aspects of caring work mean that it is impossible to commodify in any usually understood sense of the term."⁵² This is why "[p]eople are unwilling to outsource care relationships because ...to do so would deny them and their loved one the reciprocal rewards of a caring relationship."⁵³

1.5.4 If we classify having a child as a lifestyle choice, we fail to recognise the wider importance to society of having a child or caring for it. Herring has expressed concern about the idea of caring as a lifestyle choice, believing it to be more important than this.

⁵¹ Nicola Busby, *"A Right to care?: unpaid care work in European employment law"*, Oxford University Press, 2011, p48

⁵² Crompton (n7), p191

⁵³, Busby (n51), p42

His view, that "... it is work that carries considerable social value, meets society's obligations to those in need and fulfils a justified moral obligation"⁵⁴, justifies it having a higher status and gives weight to the argument that it should be protected.

1.5.5 For the purposes of the rest of this section I will consider pregnancy and the care of children separately as they each have unique features. In Chapter 2 I will argue that the law should also recognise their separate nature, rather than conflating the two. The reasons for this are set out at 2.5.4.

Why pregnancy deserves protection

1.5.6 Pregnancy is an issue that is seen as being exclusively female, because only women can be pregnant. Yet pregnancy is an issue that affects society as an entirety⁵⁵: if women do not become pregnant and do not have children then, as set out at 1.5.2, the effects on society will be catastrophic. Society should, therefore, view any detriment that is imposed by it on pregnant women and which deters them from becoming pregnant (whether at a particular time (for example, early in their careers) or at all) as a harm to society and not just to the pregnant woman.. Further, because only women can become pregnant, any detriment as a result of pregnancy is invariably linked to gender. It is fundamentally unfair that a women carrying out a socially useful role (i.e. being pregnant) should herself suffer detriment simply as a result of that useful role. It is also inequitable that women should be disadvantaged for carrying out a role that only women can undertake. The capacity to become pregnant is something that most women are born with, and importantly, something that no man is born with. It is an entirely female characteristic.

1.5.7 Before considering the difficulties facing those that elect to have children, it is important to note that even those women who do not have children may be disadvantaged by the fact that women have the capacity to become pregnant. MacKinnon has found that "[w]hether or not women have children, they are disadvantaged by social norms that limit their options because of women's enforced role in childbearing and

⁵⁴ Jonathan Herring (2013) "Caring and the law". Oxford: Hart Publishing, p96

⁵⁵ This point has been made by many commentators, for example, Sandra Fredman, "A Difference with Distinction: Pregnancy and Parenthood Reassessed", *LQR* 1994, 110 (Jan), 16-123 "...pregnancy is not only a common experience but performs an indispensable social function.", 106

childrearing.”⁵⁶ Essentially, there seems to be an assumption by employers that any woman may become a mother at any time (up until this is no longer a biological possibility). The fact that a man can become a father at any time (and, arguably, has less control over this possibility) does not, however, seem to hamper men’s career prospects.

1.5.8 Where women are not able to combine work and family, they may feel obligated to postpone having children. There is evidence to suggest that this is more likely to be the case for highly educated women⁵⁷. Wolf has noted that childbearing may be a rational career choice for those women who are not academically minded, but is less likely to be so for a woman who has chosen a professional career following study at university⁵⁸. The implication from this comment is that those with academic and professional achievements are most worthy of having children but are the most likely to be deterred from doing so. I do not agree with this assumption; being academic or having a professional career does not make you a good parent or someone who is capable of raising children who will be productive members of society. However, the issue that this comment does raise, which is of concern, is that having a professional career may be seen as being incompatible with motherhood. If this is the case, women who want to be mothers may simply opt out of academia, given that there is no long-term prospect of them being able to combine this with motherhood. This would be bad for society as a whole, and particularly for employers, because it would mean that the pool of potential talent would be smaller than it would be were such women included.

1.5.9 Women that choose to pursue academic or professional careers may perceive⁵⁹ that they will pay a far higher cost if they decide to have a child at the beginning of their career. There is some evidence to suggest that this is not true (although, for reasons discussed below, this evidence may not stand up to scrutiny). A report to the Women’s Unit of the Cabinet Office⁶⁰ stated that when considering women’s lifetime earnings,

⁵⁶ Catharine MacKinnon “Reflections on Sex Equality under Law”, *The Yale Law Journal*, Vol.500, No.5, Centennial Issue (Mar 1991), pp1281-1328, 1312

⁵⁷ Cecile Wetzels “*Squeezing Birth into Working Life: household panel data analysis comparing Germany, Great Britain, Sweden and the Netherlands*”, Ashgate Publishing Limited, 2001

⁵⁸ Alison Wolf, “Working Girls”, *Prospect*, April 2006, Issue 121

⁵⁹ I would note that this is about perception, rather than what would necessarily occur. There does not appear to be any research into what effect having a child has on a woman’s career progression and whether this varies according to the age at which a woman has a child.

⁶⁰ “*Women’s Incomes over the Lifetime - a report to the Women’s Unit, Cabinet Office*”, TSO, 2000

women with high educational attainment showed little shortfall when compared to a childless woman. This report was based on two assumptions which I wish to challenge.

1.5.10 The report assumes that a mother with two children would remain continuously employed after having both children, except for a period of paid maternity leave and a period of one year working part-time. Interestingly, there are no statistics on how long mothers work part-time for after having a child. There seems to be no particular reason why this would be limited to a year, particularly given that children only start school in the academic year that they turn five. Further, as discussed in Chapter 4, the right to request flexible working is a right to request a permanent, not a temporary, change to an employee's working pattern. Indeed, one of the criticisms that has been levelled at the current right is that there is no requirement for an employer to consider a request for an employee to cease working flexibly.

1.5.11 The report also assumes that a mother would remain employed in the same role as she had done prior to maternity leave. This does not factor in the situation where women do not return to work after maternity leave, which is the case for 30% of women⁶¹. It also does not factor in what happens if a mother is not able to work part-time and thus not able to reconcile her work and family responsibilities. As discussed in Chapter 4, whilst there is a right to request flexible working, there is no absolute right for such a request to be granted. This means that a mother might not be able to continue in the role that she had done prior to maternity leave if she wanted to combine both work and childcare responsibilities and might have to move into a (lower paid and lower status) part-time role. There is some evidence to suggest that this type of downsizing (i.e. moving from a more senior post to a more junior to allow a woman to combine work and family responsibilities) occurs in some sectors. A 2009 inquiry undertaken by the EHRC into sex discrimination in the financial services sector⁶² found that, in that sector at least, there is

⁶¹ *Work and Parents: Competitiveness and Choice*, Department for Trade and Industry, November 2000. This found that there were approximately 350,000 pregnant women who were working each year and that the approximate number of women returning to work after giving birth was 240,000.

⁶² *Financial Services Inquiry: Sex discrimination and gender pay gap report of the Equality and Human Rights Commission*, Equality and Human Rights Commission, September 2009

evidence of downshifting) following the birth of a child. This seems to occur on the basis that certain jobs seem to require an employee to work extremely long hours.

1.5.12 For the reasons above, therefore, the figures detailed in the report 'Women's Incomes over the Lifetime' which suggest that women with high educational attainment suffer less loss of income as a result of having children than those with less educational attainment may not provide an accurate assessment of the situation. The fact that professional women continue to believe that they may be subjected to detriment if they have a child at the beginning of their career (and thus that some choose to delay motherhood) also suggests that this report may misrepresent the situation.

1.5.13 The statistics demonstrate that there are many women who have children later than, for example, twenty years ago. ONS data shows an increase over time in the numbers of women having children aged 40 or above⁶³. Whilst it is impossible to attribute this change in behaviour to the perceived detrimental impact that having a child may have on a woman's early career development, this may be a factor in this change. A recent survey by the Department for Business, Innovation and Skills ("BIS") found that one of the top three concerns of pregnant women before they went on maternity leave was that pregnancy would affect their career⁶⁴. This should be of concern to society as a whole (as well as the individual concerned) because a delay in having children may mean that a woman finds it more difficult or is unable to become pregnant⁶⁵, and, for those that do fall pregnant, it may have consequences for the wellbeing and/or health of the future children.

1.5.14 There is also a cost to society if women who have children are unable to combine their childcare responsibilities with their careers. If these women are forced to choose between work and children and choose the latter, the workplace loses out on a pool of

⁶³ Annex 1

⁶⁴ BIS (2015) "*Shared Parental Leave: Public Attitudes*", January 2015

⁶⁵ According to the NHS' website (<http://www.nhs.uk/Livewell/Fertility/Pages/Protectyourfertility.aspx>), fertility declines over time and in women fertility declines rapidly after 35. Women over 35 are also less likely to become pregnant as a result of fertility treatments, including IVF, and are more likely to have a miscarriage if they do become pregnant.

talented women. Further, the economy also loses out in terms of loss of productivity from these women no longer working⁶⁶.

1.5.15 The individual employer also suffers a detriment in terms of the costs of recruiting a replacement for the mother. These costs can be significant. Research by the CIPD estimates that the median cost of recruiting a replacement is £5,000 for senior managers and £2,000 for other employees⁶⁷. In addition to these recruitment costs, there may be other costs in terms of, for example, training the employee. Given the fact that employers incur costs when an employee does not return from maternity leave, it might appear strange that employers do not do more to accommodate women's childcare responsibilities. One reason for this may be that employers do not connect the costs that they bear as a result of a woman not returning to work after maternity leave with the fact that they may have been able to avoid these costs by accommodating the woman's childcare responsibilities. In some cases this may be because of the employer's assumption that women will want to give up work after the birth of a child, which interestingly they do not assume about new fathers.

Why parenting and childcare deserve protection

1.5.16 As set out at 1.5.2, once a child has been born, there is a need for someone to care for that child. In this section I set out why it is important for parents to be able to spend time caring for their child. As already set out at 1.5.3, care involves two intertwined aspects, the physical tasks and an emotional element. The latter is the reason that the identity of the person providing the care is key. Parents have an impact on how their children function and upon their development, including their self-esteem, academic achievement and behaviour⁶⁸. Parenting is crucial to the development of a child. It is therefore in society's interests for parents to be able to spend time with their children in

⁶⁶ Sylvia Walby and Wendy Olsen 'The impact of women's position in the labour market on pay and implications for UK productivity', DTI, November 2002

⁶⁷ "Resourcing and Talent Planning – Annual Survey Report 2013", CIPD in partnership with Hays

⁶⁸ Flouri and Buchanan (2003), "The role of father involvement and mother involvement in adolescents' psychological well-being", *British Journal of Social Work*, 33, 399-406, low involvement by fathers in upbringing of children is linked with negative outcomes for children.

order to ensure that they develop as individuals. This is about ensuring that we make "...a sufficient investment in the next generation."⁶⁹

1.5.17 The quality of parenting has an impact throughout a child's life and can affect the child's behaviour. In the UK in recent years, there have been concerns over poor youth behaviour. According to a Demos report, "The Home Front"⁷⁰ there are some indicators which would suggest that youth behaviour is worsening. These include "...the prevalence of conduct problems in 15-year-olds more than doubling from 6.8 per cent in 1974 to 14.9 per cent in 1999..."⁷¹, the UK having the highest rate of youth offending in Europe, and, as Margo has noted⁷², individuals in the UK being more scared of young people than those in other European countries. Given the linkage between behaviour and parenting, it would seem arguable that there should be greater emphasis on the role of parents and the importance of this for society as a whole. It is notable that the Demos report states that "...there is a strong feeling that parenting is in crisis, that mums and dads are not fulfilling their duty to their children and to society, and that we are all suffering as a consequence. I would argue that one of the reasons that some parents are unable to fulfil their duties to their children is because of the fact that they are forced to prioritise work over family responsibilities in order to comply with the normative standard of a worker (and to remain employed).

1.5.18 The other part of this issue is the fact that childcare and parenting need to be seen as the crucial roles that they are for society as a whole. Arguably two of the main political parties in Britain are beginning to realise the centrality of these roles⁷³, as both the Labour⁷⁴ and Conservative manifestos⁷⁵ in the 2010 national elections⁷⁶ recognised the

⁶⁹ Jendi Reiter, "Accommodating pregnancy and breastfeeding in the workplace: beyond the civil rights paradigm", *Texas Journal of Women and the Law*, Volume 9, 1999-2000, 1; 17

⁷⁰ Jen Lexmond, Louise Bazalgette, Julia Margo, "The Home Front", Demos, 2011

⁷¹ p26. The report does caveat these figures noting that there is "...no generally accepted and consistent definition of conduct disorder..." and therefore it is not possible to know whether the data is comparable

⁷² Margo and Stevens, "Make me a Criminal: Preventing Youth Crime", ippr, February 2008

⁷³ The Liberal Democrats may also recognise this, however, their 2010 manifesto, whilst including a number of measures which would suggest that they recognise the importance of the family, does not explicitly state why family/parenting/childcare is important.

⁷⁴ Chapter 6 of the Labour Manifesto 2010 ("A future fair for all") considers how to support families

⁷⁵ p41-44 of the Conservative Manifesto 2010 ("Invitation to Join the Government of Britain") consider the issue of making Britain the most family friendly country in Europe

⁷⁶ In the 2015 national elections whilst the Labour manifesto had several references to the importance of family (for example, p44 states that "...the family, in all its various shapes and sizes, is its bedrock.") There was, though, no equivalent statement in the Conservative manifesto.

importance of the role of the family and both stated that strong families are the bedrock of society.⁷⁷ It is essential that society recognises why childcare and parenting are significant. One of the reasons that childcare has not been valued may be because this has predominantly been a role undertaken by women. Crompton's view, with which I agree, is that "...because caring has been seen as 'natural' to women, requiring few skills, care work is often poorly paid."⁷⁸ Other roles predominantly undertaken by women are also undervalued, such as caring for others (including the elderly or disabled) and housework.

1.5.19 It is also important to ensure that we do not fall into the trap of simply valuing mothering because those that (currently) predominantly care for children are women.. If we place too much value on mothering, rather than parenting, we leave open the possibility of people arguing that mothering should be valued above all else and thus work should not interfere with this function. Fredman⁷⁹ has considered this issue. Her research has found that this was the historical position as espoused by Beveridge, the architect of the Welfare State. She makes the point that "...it is necessary to make a conscious and explicit decision on the social value of parenthood and to formulate legal rules to reflect this."⁸⁰ This approach has the advantage of valuing the contribution of both mothers and fathers. This is important because greater male involvement in childcare could have the effect of changing the normative worker, which in turn could remove some of the barriers that women face in the workplace.

1.5.20 There are also economic reasons to enable parents to combine work and parenting responsibilities. If we make people choose between their family responsibilities and working, then some may choose to prioritise their parenting responsibilities over their careers or jobs. This does not necessarily mean that they will opt out of the workplace but they may look for a job which allows them to combine both. Unfortunately, much of the evidence suggests that many of the roles that would allow workers to combine their jobs and their family responsibilities, particularly part-time roles, are lower paid jobs with low status. This means that we may be losing talented people from roles that they are very

⁷⁷ p62 of the Labour Manifesto, p41 of the Conservative Manifesto.

⁷⁸ Crompton (n7), p192

⁷⁹ Sandra Fredman (1997) *Women and the Law*, Oxford: Oxford University Press

⁸⁰ *ibid*, p107

capable of doing but which are not thought to be compatible with family responsibilities to work in roles for which they are over-qualified. This latter point is perfectly illustrated by anecdotal evidence provided to Kingsmill by employers whilst she was preparing her 2003 review into women's employment and pay, which suggested that there were some women with doctorates who were working as part-time shelf stackers in a supermarket⁸¹. As Kingsmill has noted, "...this is not simply of a waste of valuable education and skills but a misallocation of scarce human capital resources that has potentially serious implications for Britain's economic performance."⁸² This may not just affect individual employers or Britain's short-term economic performance, it may also have longer-term consequences for the State. Those on low incomes are less likely to be able to save and therefore less likely to have sufficient savings to draw upon either when they encounter unemployment (or some other financial issue) or during retirement. Consequently, they are more likely to need to claim benefits. As such, forcing women into lower paid work has a greater financial cost for society in terms of provision of state benefits. There is also another issue here. There is evidence to suggest that the quality of paid work undertaken by a parent has an impact on parenting. Research shows that parents who have more control over their paid employment are more likely to encourage independence and self-control in their children⁸³.

1.5.21 As an alternative to working part-time, parents who are unable to achieve a desirable work-life balance may choose to take an extended absence from the workplace (for example until their children go to school). The evidence suggests that, where workers take such extended breaks from work, they find it difficult to find subsequent employment and/or the employment that they do eventually find is at a lower wage than their previous employment.⁸⁴ This again may have an economic impact on the State in terms of the worker claiming benefits in relation to the period when they are searching

⁸¹ Denise Kingsmill, *"Review of Women's Employment and Pay"*, 2003, 84

⁸² *ibid*

⁸³ Les Whitbeck et al, "The effects of parents' working conditions and family economic hardship on parenting behaviors and children's self-efficacy", *Social Psychology Quarterly* 60, no 4 (1997)

⁸⁴ According to the British Household Panel Survey women who return to employment after a 1 year absence receive a wage which is on average 16.1% less than the one they had before and women and men that return to employment after an absence of 6 months or more experience a 13.6% drop in wages.

for work and also, if they are on a lower wage when they return, this may impact on their ability to save for retirement, thereby meaning that they rely on State benefits later in life. Similarly, it may impact on the amount of tax paid to the State.

1.5.22 If there is a value to being a parent and to parents spending time with their children, then we need to begin to communicate this to everyone. If we do not (or we are not clear on what the value is to the individual, the community and society as a whole) then any treatment that is provided only to parents is likely to be viewed with resentment by those who do not have children.

1.5.23 Research undertaken by Houston and Marks showed that “[t]hose [women] who had no children rated mothers as workers more negatively than any of the groups of workers”⁸⁵ and Young’s research⁸⁶ has found that those workers without children may be excluded from certain rights (such as rights to leave) and may therefore have a sense of injustice, which can create resentment. This reiterates the point that those without children do not always understand or accept the value of parenting for society as a whole. We need to be able clearly to enunciate why parenting/childcare are valuable to society and to explain the rationale for any adjustments to working practices and/or conditions which are provided only to parents. In order for businesses to support any parent-specific rights or changes to existing legislation, we also need to be able to demonstrate the benefits for them. As set out above, one of the key benefits would be the retention of staff, thereby reducing recruitment costs. A further benefit would be a wider pool of potential employees. There is also the issue that currently the skills that parents acquire at home are not viewed by employers as being relevant or valuable in the workplace. In Chapter 2, I argue that this is because of the idea of separate spheres (work/home) that are entirely independent. However, the skills that parents learn or deploy at home may be of benefit to employers. We therefore need to encourage employers to view things in this way.

⁸⁵ Diane Houston and Gillian Marks “Attitudes towards work and motherhood held by working and non-working mothers.”, *Work Employment & Society*, 16:523-536

⁸⁶ Mary Young, “Work-family Backlash: Begging the question, what’s fair?”, *Annals of the American Academy of Political and Social Science*, 562, 32-46.

1.5.24 It is also vital that managers (rather than just the senior management of organisations) are aware of the benefits of allowing workers to combine their work and home responsibilities. Research suggests that those workers who have a powerful manager who can protect the worker from any negative career impact as a result of using work-life balance policies, which in turn can increase worker's uptake of such policies⁸⁷. HR managers in particular may have an impact on the implementation of work-life balance policies as research suggests that these particular professionals can have an impact on how an organisation's policies on work-life balance develop; i.e. if the HR director believes strongly in the benefits of work-life balance, then the organisation will have better policies on work-life balance.⁸⁸

1.6 Justification for State intervention

1.6.1 Having argued above that law can be of assistance to parents seeking to reconcile work and family responsibilities, below I set out the justification for intervention by the State. The issue of whether parents can combine work and childcare is of importance, not only to parents, but also to society as a whole, for a number of reasons, which can be divided into the following topics: economic, social and political/legal. I examine each of these in turn from 1.6.2 to 1.6.11. However, as well as (domestic) state intervention, there is also intervention by the European Union ("EU"), for example, through the anti-discrimination directives that have been passed. I consider the reasons for EU intervention in tandem with the reasons for State intervention at the domestic level.

Economic

1.6.2 One of the aims of the EU is to create a single market and so the reason for regulation between member states is to ensure fair competition. If there were no minimum standards imposed by the EU, then competitors operating in those member states with protections for their workers in terms of regulation of working time, family

⁸⁷ Amys Wharton and Mary Blair-Loy "The 'Overtime Culture' in a Global Corporation - A cross-national study of finance professionals' interest in working part-time", *Work and Occupations*, 29, 32-63

E Hill "Work-family Facilitation and Conflict: working fathers and mothers work-family stressors and support", *Journal of Family Issues*, 26, 793-819.

⁸⁸ Ellen Kossek, Parshotam Dass and Beverly Demarr "The Dominant Logic of Employer-Sponsored Work and Family Initiatives - Human-Resource Managers Institutional Role", *Human Relations*, 47, 1121-1149; Frances Miliken, Luis Martin, and Hal Morgan. "Explaining Organizational Responsiveness to Work-family Issues: The role of the human resources executives as issue interpreters", *Academy of Management Journal*, 1998, 42.

friendly protections and the like would be at a disadvantage as compared to those member states with no such protections.

1.6.3 From the State's perspective, there is a waste of talent if a significant proportion of the population ceases to engage in paid labour or engages in work for which it is over qualified as a result of their caring responsibilities. In countries such as Britain, where the State funds the education system, there is an investment in each individual and if that individual stops participating in the labour market and using the skills that s/he has acquired at the State's cost, this is undesirable and does not make sense from an economic perspective.

1.6.4 There is research to suggest that increasing women's participation in the labour market would be worth between £15bn and £23bn to the economy⁸⁹. A report by the Fawcett Society similarly suggests that the UK stands to gain the equivalent to 2% of GDP by better harnessing women's skills (which, at the time of the report, was also estimated to be £23bn)⁹⁰ At a time when the UK has a large deficit and is recovering from a period of recession, it is important that we utilize all of our resources effectively. If parents cannot work because they cannot combine their work and family lives, the UK's economy is the loser.

1.6.5 The UK's failure to allow parents to combine work and family responsibilities could also be having an impact upon the composition of the UK's population, which could have long-term effects on the UK's economic outlook⁹¹. The UK has an ageing population: in 1971 the average age was 34.1, in 2012 this had risen to 39.7⁹². One of the factors attributed to this is the declining birth rate, with women opting to have less children⁹³. An ageing population causes economic problems. There is an increase in the number of people receiving retirement benefits and medical/social care, all of which need to be paid

⁸⁹ The Women and Work Commission reached this conclusion in 2006 in the paper *"Women and Work Commission, Shaping a fairer future"*

⁹⁰ Rowena Lewis and Katherine Rake *"Breaking the Mould for Women Leaders: could boardroom quotas hold the key? A Fawcett Society think piece for the Gender Equality Forum"* October 2008

⁹¹ Edmund Conway, "UK's aging population is a bigger economic threat than the financial crisis", *Telegraph*, 12 February 2010,

⁹² "National Population Projections", *2012-Based Statistical Bulletin*, ONS, 6 November 2013

⁹³ *ibid*

for by a decreasing number of taxpayers. In the UK age-related public expenditure is anticipated to rise from 18.9 per cent of GDP in 2007 to 24 per cent of GDP in 2060⁹⁴.

Social

1.6.6 As discussed above at 1.2, this issue is also crucial from a gender equality perspective. Whilst GB has made great strides towards securing gender equality, there is still much to do in the sphere of employment; whilst in terms of overall gender equality the UK is ranked 26th in the world by the World Economic Forum, it is ranked 46th in terms of economic participation and opportunity⁹⁵. Dowd has stated that “[t]he reconciliation of employment responsibilities with the demands of childbirth and child-rearing remains a critical issue in the achievement of true equal employment opportunity for women”⁹⁶. Further, the Women and Work Commission⁹⁷ has suggested that one of the major contributing factors to the UK’s gender pay gap is the impact of family responsibilities on women’s career opportunities. As identified at 1.3.5, more evenly distributing childcare responsibilities across the sexes could reduce the gender pay gap. As such, it is arguable that one of the reasons for the UK’s failure to secure gender equality is the fact that GB employment law still does not provide adequate rights for working parents. Given the adverse impact of care responsibilities on individuals, Busby argues that “...society has a moral duty to recognise and reduce the heavy social burden imposed on those engaged in such relationships through shared responsibility.”⁹⁸ As I argue later in this these, caring for a child needs to be valued and the costs associated with this care should be borne, not by the individual, but across society as a whole.

1.6.7 However, the difficulty in combining family and work responsibilities is not just an issue for women; men are also denied the opportunity to play more active roles in the upbringing of their children. Men “...have been pushed by societal values and workplace structures into being relatively uninvolved with the rearing of their children.”⁹⁹ As

⁹⁴ “Is business ready for an ageing nation? Economic opportunities and challenges of ageing: Analytical paper”, BIS, March 2010

⁹⁵ Yasmina Bekhouche, Ricardo Hausmann, Laura Tyson, Saadia Zahidi, “The Global Gender Gap Report 2014”, World Economic Forum

⁹⁶ Nancy Dowd, “Maternity Leave: Taking Sex Differences into Account”, 54 *Fordham L Rev* 699 1985-1986, 699

⁹⁷ Women and Work Commission (n89)

⁹⁸ Busby (n51), p40

⁹⁹ Lucinda Finley “Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate.” 86 *Colum L Rev* 1118 1986, 1123

discussed at 1.2.3, the ideology of fatherhood values the financial contribution that fathers make to their households, rather than the time they spend actually caring. We need effective gender-neutral rights to allow parents the time and space to care for their children.

1.6.8 There is a further social issue: if single parents are either unable to work because of their childcare responsibilities, or if they are only able to work in low-paid occupations because these are the only roles that will accommodate parental responsibilities, then there will be large numbers of children being raised in poverty. As has been noted, “[t]he consequences for these children, and for the society they will inherit, will be severe. A society stratified by a rigid and deep class structure, with a poor and unskilled underclass, is in jeopardy both for its political stability and its economic prosperity.”¹⁰⁰ Equally as, Trevor Phillips¹⁰¹ suggests “...if jobs and prosperity return for everybody except women, ethnic minorities, the young, the old or disabled people then we will still be paying the welfare bill for people who are kept out of work by discrimination...”.

Political/Legal

1.6.9 As a member state of the EU, the UK has certain obligations to apply European law. European intervention in this arena occurs because the EU is “...is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity.”¹⁰² As such, the Charter of Fundamental Rights of the EU includes articles on non-discrimination¹⁰³, equality between men and women¹⁰⁴ and reconciliation between family and professional life¹⁰⁵.

1.6.10 In addition to European obligations, the UK is also bound by other standards, such as those set by the International Labour Organisation (“ILO”), of which the UK is a member. The ILO has clearly recognised the importance of ensuring equal treatment for those with family responsibilities as demonstrated by Convention 156¹⁰⁶ which

¹⁰⁰ Judith Olans Brown, Wendy E Parmet, Phyllis Tropper Baumann, “The Failure of Gender Equality: An Essay in Constitutional Dissonance”, 16 *Buff L Rev* 574 1987 at 587

¹⁰¹ “Why Equality and Human Rights Are Essential To Economic Recovery”, Policy Exchange, 8 February 2011

¹⁰² Charter of Fundamental Rights of the EU (2000/C 364/01)

¹⁰³ Article 21

¹⁰⁴ Article 23

¹⁰⁵ Article 33

¹⁰⁶ Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, adopted at the 67th ILC session (23 June 1981)

recognises that “...the problems of workers with family responsibilities are aspects of wider issues regarding the family and society which should be taken into account in national policies” and that “...many of the problems facing all workers are aggravated in the cases of workers with family responsibilities and that [there is a]....need to improve the conditions of the latter both by measures responding to their special needs and by measures designed to improve the conditions of workers in general”¹⁰⁷. (It is of note that Convention 156 has not been ratified by the UK.)

1.6.11 In addition to ILO obligations, the UK has also ratified the Convention on the Elimination of Discrimination Against Women (“CEDAW”). CEDAW recognises that the contribution of women to the welfare of the family and to the development has not been fully recognised, that there is a social significance to maternity, that the role of women in procreation should not be a basis for discrimination and that the upbringing of children requires a sharing of responsibility between men and women and society as a whole¹⁰⁸.

1.7 Valuing caring or just childcare?

1.7.1 Above I have been arguing that, essentially, parenting is a social good that benefits society as a whole. As parenting is a form of caring, to the extent that it should be given a protected status (or additional rights) in the workplace, should caring more generally also enjoy this status or is there some basis for differentiating parenting as a form of caring?

1.7.2 As outlined below, caring for others is also such a social good, and, has economic benefits for society in the same way that parenting does. According to a report prepared for Carers UK, the economic value of the contribution, made by carers to the economy of the UK is £87 billion per year¹⁰⁹. Before considering these issues in more detail though, we need to consider what we mean by caring. I would note that consistent with Herring’s view that the definition of care “...depends on the context within which the term is being

¹⁰⁷ Preamble to C156

¹⁰⁸ Recitals of CEDAW. Article 5 of CEDAW requires States to “...take all appropriate measures to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children...” Whilst Article 11 requires states to take appropriate measures to introduce maternity leave with pay of comparable social benefits, to prohibit dismissal on the grounds of pregnancy and to provide special protection to women during pregnancy in types of work proved to be harmful to them.

¹⁰⁹ “Valuing Carers – Calculating the Value of Unpaid Care”; Lisa Buckner and Sue Yeandle, September 2007, published by Carers UK

used.”¹¹⁰ Here I am considering the definition of care solely in the employment rights context. I am not, therefore, advocating that the definition should be applied anywhere other than the employment sphere. Engster¹¹¹ has suggested that caring can be defined as “...everything we do directly to help individuals to meet their basic needs, develop or maintain their basic capabilities, and live as much as possible free from suffering, so that they can survive and function at least at a minimally decent level.”¹¹² However, he also suggests that “...caring means not only achieving certain aims but also doing so in a caring manner”¹¹³. For the purposes of discussion of the rights of carers in the workplace, I do not believe it is necessary to include this within the definition of caring as it would import a subjective test into the consideration of whether someone is a carer, which is likely to reduce the number of people that fall within any protection that it is appropriate to offer rather than being all encompassing (however, I appreciate that in other contexts the manner in which care is undertaken is crucial).

1.7.3 Notwithstanding the above, does it matter how carers are treated and what difficulties they may face in the workplace by virtue of their caring responsibilities? As with parenting, there is an underlying gender element to caring. Caring was historically done in the home, the private sphere, by women. I agree with Nakano Green’s observation that this seems to have resulted in the devaluing of care work¹¹⁴. This affects not only unpaid carers but also paid ones: research suggests that there is a pay penalty attached for paid care relative to other jobs¹¹⁵. The way in which caring is valued or devalued, and thus the way in which carers are treated, is a gender equality issue because, as England has noted “...women do such a high proportion of paid and unpaid care work...that how well a society rewards care work impacts gender inequality.”¹¹⁶

1.7.4 Whilst caring is still done by a greater number of women than men, the statistics suggest that the difference in the numbers of men and women caring is relatively small.

¹¹⁰ Herring (n54), p14

¹¹¹ Daniel Engster “Rethinking Care Theory: The Practice of Caring and the Obligation to Care”, *Hypatia*, Vol.20, No.3 (Summer, 2005), pp50-74

¹¹² *ibid*, 53-54

¹¹³ Engster (n111), 54

¹¹⁴ Evelyn Nakano Green “Creating a Caring Society”, *Contemporary Sociology*, Vol.29, No.1, Jan 2000

¹¹⁵ Paula England, Nancy Folbre “The Care of Caring” *Annals of the American Academy of Political and Social Science*, Vol 561 (Jan 1999), pp39-51

¹¹⁶ Paula England “Emerging Theories of Care Work”, *Annu. Rev. Sociol.* 2005, 31:381-99

According to Carers UK, the chance of becoming a carer in any one year is 7.25% for women and 5.8% for men¹¹⁷ However, what these statistics do not demonstrate is how much time each of the sexes actually spend caring. In the context of childcare, despite the fact that both parents have the same care responsibilities, women take a greater role in providing care. The time use surveys that identify this trend do not have a separate category for care (other than childcare) – care is included within domestic responsibilities (women, on average, spend 240 minutes compared with the 148 minutes spent by men) and it is therefore difficult to identify whether there are disparities in the amount of time spent by women caring (rather than carrying out other domestic responsibilities, such as cleaning). US statistics show that female caregivers spend 50% more time providing care than male caregivers¹¹⁸. As with parenting then, there appears to be a gender equality aspect to providing appropriate rights for carers.

1.7.5 Further, just like parenting, caring can have an impact on the carer's ability to fully participate in the workplace. This, in part, will depend on how much care the carer is required to give. However, some research¹¹⁹ has found that, unlike mothers who opt to work on a part-time basis in order to try to combine work and family responsibilities, there is no indication that it is easier to combine part-time work with caring than it is to do so with full-time work. The key aspect of whether a role can be combined with caring appears to be more to do with the flexibility that the role offers and it may be that the types of part-time role that allow parents to combine work and family (for example, working during school hours) are not as helpful for carers of, for example, elderly relatives (who may not have assistance during these hours).

1.7.6 Care is important for society as a whole; Nakano Green's statement that "[i]t seems inherent in the definition of a good society that those who cannot care for themselves are cared for"¹²⁰ demonstrates this. There is clearly a need for people to undertake care for others and Engster has suggested that this dependence on each other

¹¹⁷ ...it could be you – a report on the chances of becoming a carer; Mike George/Carers UK, 2001]

¹¹⁸ "Women and Caregiving: Facts and Figures" on Family Caregiver Alliance (<http://www.caregiver.org>)

¹¹⁹ Ursula Henz, "Informal Caregiving at Working Age: Effects of Job Characteristics and Family Configuration", *Journal of Marriage and Family*, Vol.68, No.2 (May 2006), pp411-429

¹²⁰ Nakano Green (n114), 84

“...obligates each and every member of society to help support caring activities.”¹²¹

Essentially, as we may all need care at some point in our lives, we have an obligation to provide care for others. On this basis, caregiving benefits not only those that directly receive the care, but society as a whole.

1.7.7 In light of all the similarities explored above, to the extent that rights for parents can be justified on the basis of allowing and enabling them to care, similar rights should be available for other carers where they need these to carry out their caring responsibilities. For the purposes of considering whether the current regime of parental rights enables parents to combine work and family (in Chapters 3 to 5) though, I shall focus on parents, rather than carers more generally.

1.8 Who should bear the cost of time off for parental related issues?

1.8.1 The question of who should bear the costs of family friendly measures is crucial. First though, it is important to acknowledge that there is a cost attached to some measures necessary to allow parents to reconcile their work and family responsibilities, for example, periods of leave. There may be other measures, such as restructuring the hours that a worker needs to work to accommodate his/her parental responsibilities, which would not necessarily involve any additional cost. The current regime in GB means that, effectively, parents have to bear the majority of the costs if they are absent from work exercising one of the parental leave rights (the "**Leave Costs**"), unless their employer voluntarily provides fully paid leave. This is because the types of parental leave are either unpaid or are paid at very low rates. This is unfair. I agree with James that there is a need “...to ensure that, as far as is possible, parents are not financially penalised for the care-giving they undertake.”¹²² Where there are financial penalties for care-giving for the reasons set out earlier this affects women more severely. As argued above, society benefits from mothers taking leave to have children (i.e. maternity leave) and from parents taking leave to care for their children (e.g. parental leave). It would therefore be unfair for workers alone to bear the costs of actions which ultimately benefit society. Further, where workers

¹²¹ Engster (n111)

¹²² James (n10), p278

bear the costs of leave themselves (by such leave being unpaid or paid at low levels) the evidence (which is examined further in Chapter 4 suggests that men will be less likely to take this leave. This has a significant effect on women's role within society and their ability to fully participate in the workplace. For reasons of social justice and because increasing women's participation in the workplace could have a significant positive economic impact, we need to encourage men to take a greater share of the responsibility for childcare. This means that these rights need to be paid at a higher rate than they currently are.

1.8.2 Where the individual worker does not bear the cost of leave, there are three other possibilities: employers (whether that is the particular worker's employer or employers as a group collectively), workers (as a group collectively) or the State.

Employers (whether the worker's employer or employers as a collective group)

1.8.3 As acknowledged by a White House paper a key argument against employers providing paid leave is that "...such practices are costly and place an unfair burden on employers."¹²³ As the same paper finds though, employers may actually, in the long-term financially benefit from offering workers paid leave. There is a "...body of research that finds that these practices [paid family leave and flexible workplace policies] can benefit employers by improving their ability to recruit and retain talent, lowering costly worker turnover and minimizing loss of firm-specific skills and human capital, as well as boosting morale and worker productivity."¹²⁴ In particular, paid periods of maternity leave have been demonstrated to increase the likelihood of a new mother returning to her previous role with her employer¹²⁵. As discussed above at 1.5.15, there is a cost to individual employers if they fail to retain women on maternity leave in terms of losing skilled workers, who might have knowledge of the organisation but also in terms of recruitment costs. Research from 2000 suggests that just under a third (30%) of women that give birth do not return to work.¹²⁶ This would equate to a significant cost to the employers of those

¹²³ "The Economics of Paid and Unpaid Leave", The Council of Economic Advisers, June 2014, p16

¹²⁴ *ibid*, p17

¹²⁵ Jane Waldfogel, Yoshio Higuchi and Masahiro Abe. 1999. "Family Leave Policies and Women's Retention after Childbirth: Evidence from the United States, Britain, and Japan." *Journal of Population Economics* 12, no 4: 523-545

¹²⁶ DTI (n61)

women. Similar issues would be anticipated if there were longer periods of leave available for fathers. This means that there is a cost associated with not offering pay for periods of family-friendly leave (in terms of the possibility of not retaining those workers).

1.8.4 Requiring the particular employer of the worker taking leave to bear the Leave Costs of its own employees would be problematic as this might act as a disincentive for employers to employ women with children or women of childbearing age. Although both men and women may exercise one of the rights to Parental Leave, at the moment women are more likely than men to exercise these rights and therefore, from the employer's perspective, there is a greater risk of that particular employer having to bear the Leave Costs if it chooses to employ a woman with children or a woman of childbearing age. Fredman argues that "...employment rights need to be divorced from the individual employment relationship... Duties fall on employers, not because of their immediate control over the time and commitment of an individual worker, but because of the civic responsibility which attaches to those with power."¹²⁷ This is quite an appealing argument as it would suggest that all employers should equally bear the Leave Costs rather than the particular employer who employs the employee who exercises one of the parental leave rights. This would considerably reduce the unexpected burden on an employer if one of its employees wished to take some form of Parental Leave, as the cost would be spread amongst all employers in the pool. It could also cancel out the disincentive of employing women with children or of childbearing age, since employers would have to bear the costs of Parental Leave even if they chose not to employ these women.

1.8.5 However, we have to acknowledge that even where employers do not bear the costs of paying a worker for leave, they may incur some costs as a result of a worker being absent. This might be, for example, because the cost of engaging a temporary worker to cover the worker's role or making overtime payments to other workers in respect of additional hours that they need to work as a result of their colleague being absent exceeds the cost of the salary that the woman on maternity leave would otherwise have received.

¹²⁷ Sandra Fredman, "Women at Work: The Broken Promise of Flexicurity", *Ind Law J* (2004), 33(4):299-319

Even if there are no direct costs associated with the various forms of leave, employers also bear some costs in respect of these (whether the rights are paid or unpaid) in terms of the administration of them and the potential inconvenience of a worker being absent from the business.

Workers (collectively)

1.8.6 An alternative approach would be for workers as a collective group to bear the Leave Costs, for example, through employees' national insurance contributions. A similar position has been adopted in California in relation to Paid Family Leave. Under that scheme, as reported in the Harvard Business Review¹²⁸, paid leave is funded by worker contributions with no direct costs to employers. According to this article, workers "...have willingly paid the full, direct costs of ...programs via a payroll deduction." However, the Californian model works so well because Paid Family Leave provides leave not just for, for example, maternity leave, but also for sick leave. This means that all workers have the opportunity to benefit from the scheme, not just those with children. The position in GB would be different because the only workers that would benefit would be those with children. This might lead to increasing levels of resentment by those without children, which is unlikely to be helpful in the long-term. It also does not help with the matter of demonstrating that parenting/childcare has a value to society as a whole (and not just those in the workplace).

The State

1.8.7 Reiter has suggested that "...since the public as a whole benefits from women's assumption of these dual roles, the costs should be shared by society (e.g. tax deductions or credits for family-friendly employers) rather than imposed solely on employers."¹²⁹ There seems to be merit in this suggestion. There is a benefit to society in parents spending time with their children. The Marmot Review found a raft of positive effects of attachment between a young child and their primary care-giver (which the Review noted did not necessarily have to be the mother) including it contributing "...to the growth of a

¹²⁸ Eileen Appelbaum and Ruth Milkman "Paid Family Leave Pays Off in California", *Harvard Business Review*, January 19, 2011

¹²⁹ Reiter (n69) 21

broad range of competencies, including the self-esteem, self-efficacy and positive social skills that are associated with better educational, social and labour market outcomes in later life” resulting in “...stronger cognitive skills in young children and enhanced social competence and work skills later in school”, as well as “...better maternal and child health...”¹³⁰. These outcomes are all likely to have an input on the society’s expenditure. By way of example, better labour market outcomes means that those children are less likely to rely on state benefits and are more likely to be self-supporting. Similarly, better child health means less expenditure on healthcare. Society, therefore, benefits financially from parents spending time with their children. It is therefore appropriate that the costs associated with this are borne by society.

1.8.8 The easiest way to disperse the costs of the Parental Leave Rights across society would be for the State to bear the costs of these and for the money to be recouped through taxation. It is fairest for the Parental Leave Costs to be shared in this way because, as James has noted, “...as childrearing (and other caring) provides benefits to society as a whole, then the costs should be borne by the wider society, and not simply loaded onto parents, carers, and the organisations that employ them. If spread widely, these costs are not excessive.”¹³¹

1.8.9 Currently, although the majority of the cost burden of taking Parental Leave falls on the individual, the State does bear some of the Leave Costs as it provides pay for some types of leave, albeit at very low levels¹³². It also bears some of the Leave Costs by providing additional benefits for those with children such as child benefit and Working Families Tax Credit. The State also subsidises the cost of childcare by providing 570 hours of free nursery education for 3 to 4 year olds and the same for some 2 year olds if the employee is in receipt of certain benefits.

1.8.10 Alpern¹³³ suggests that the State should bear a proportion of the costs of family friendly policies through offering tax incentives to companies based on per capita use of

¹³⁰“*Fair Society, Health Lives: The Marmot Review*”, Strategic Review of Health Inequalities in England post-2010, Michael Marmot, February 2010 p97 -98,

¹³¹ James (n10), p212

¹³² Employees may be eligible for statutory maternity pay and statutory paternity pay – further details are at Chapter 3. Parental leave and EDL are both unpaid.

¹³³ “Solving Work/Family Conflict by Engaging Employers: A Legislative Approach”, 78 *Temp L Rev* 429 2005

the organisation's family friendly programmes. Her rationale for doing so is that she believes it is better to engage employers, for example by providing financial incentives to provide family friendly policies, rather than by implementing a law requiring the implementation of such policies. I disagree with her suggested approach for practical reasons rather than disagreeing with it on a theoretical basis. The problem with providing incentives in this way is the administrative burden that this entails, both for the employer and for the State – the employer will need to demonstrate (and the State will need to verify) that a particular policy has been implemented, and then the State will need to apply the particular tax benefit to that particular employer. However, whilst I agree with Alpern's assertion that employers need to be engaged with these issues, the need for engagement seems to be wider than just employees and employers – society as a whole needs to be engaged with these issues. Society must understand the benefits that family friendly policies provide and this seems most likely to be the case where the issue has the full force of the law to require the implementation of a particular right. The suggestion above, that employers should equally bear the costs of providing parental leave would effectively require State intervention (as the State would need to administer payments from the employers). However, it is different from the approach that Alpern suggests insofar as it would only be employers (rather than individuals making additional payments, or the State being required to divert funds from other areas) that would contribute.

1.8.11 If the State is to bear the costs of the Parental Leave Rights it would seem only just if the levels of pay for maternity, paternity and parental leave were capped to prevent high earners from using the leave, for example, to go on an exotic holiday, and their time away from work being fully paid. If there were a cap, what should it be? The aim would be to compensate workers at a level which does not deter them from exercising their rights to leave because they cannot afford to do so. Any cap would need to take into account regional variations in salary, and, rather than setting different caps for different regions, it would seem simplest to set one which took into account the earnings of the highest paid region (rather than the lowest). In 2014 median annual earnings were approximately

£27,200¹³⁴. As these are median earnings, approximately half the population would earn more than this. It may therefore be fairer to look at the national distribution of wages. These figures show that 10% of population earn more than £1,024 per week¹³⁵. This figure annualised would be approximately £53,248. As such, if the cap was set at this level, the vast majority of workers would suffer no drop in earnings through taking leave. I acknowledge that a cap of £1,050 per week is an arbitrary figure. However, there is a need to avoid to strike a balance between not unduly disadvantaging those who need to take leave connected with their family responsibilities (which would help to encourage the majority of workers with children to use these rights, irrespective of their sex) and not paying very significant amounts to a few individuals. Further, those on higher wages are likely to have (and may be able to contribute going forwards) a greater amount in respect of tax and national insurance contributions than those on a lower salary.

1.8.12 Having argued that it is important that we value parenting and that parents' family responsibilities need to be accommodated, in the next Chapter I consider some of the theories underpinning the current rights and argue that we need to adopt a new theoretical framework.

¹³⁴ According to 2014 ASHE – average annual earnings were approximately £27,200; median gross weekly earnings for full-time employees were £518, although there were significant regional variations, with London employees' median gross weekly earnings being £660.

¹³⁵ *ibid*

CHAPTER 2: The theory behind the rights regime

2.1 Theoretical backdrop

2.1.1 Prior to embarking on an analysis of the current legislation which may aid parents in combining work and family responsibilities, I first wish to consider some of the disparate theories underlying the parental rights regime and the conflict between some of these, in particular those embodying equal treatment and those embodying special treatment. I argue that each of these approaches is fundamentally flawed, such that they can never meet the needs of working parents, particularly as there is not a coherent approach to these issues, with different theories underpinning different rights.. I will then move on to propose a cohesive theoretical framework which, I argue, would better meet the needs of parents (and carers more generally) and should underpin a new regime of rights.

2.2 The Current Theoretical Framework

Equal Treatment vs Special Treatment

There has been, and still is, a lot of debate between legal scholars¹³⁶ and more widely¹³⁷ about whether women and men are essentially the same or different. These different approaches have been reflected in the different legal rights that are designed to facilitate the reconciliation of work and family responsibilities. Some of the legal concepts reflect the idea of equal treatment (for example, direct sex discrimination), whilst others reflect the idea of different treatment (for example, maternity leave). Each of the equal and different treatment approaches has different drawbacks for parents in the workplace, such that they mean the legislative provisions reflecting such theories do not (and can never) meet the needs of parents.

Equal treatment

2.2.1 In the 1960's, feminist legal theory began to develop arguments that women should be treated no differently than men. Many of these arguments focussed on securing rights and issues relating to, for example, pay. At the time, it was common for women to

¹³⁶ For example: Wendy Williams and Linda Krieger

¹³⁷ See for example, the work of John Suckling on sex differences in brain size and structure (Suckling, "A meta-analysis of sex differences in human brain structure", *Neuroscience & Biobehavioural Reviews*, Volume 39, February 2014, 34 - 50)

be paid less than men, even when they were doing similar work. By way of example, the 1968 strike by sewing machinists at Ford highlighted the fact that women were receiving a significantly lower wage than men who were doing equivalent duties. Similarly, women could be dismissed simply for getting married. (By way of example, the marriage bar continued in place in Foreign Service civil service positions until 1971¹³⁸.) As such, there was significant merit in trying to secure the same rights for women as for men. Later equal treatment feminists, such as Williams, have argued for the same treatment as men for several reasons, including the fact that special treatment "...divides us in ways that [are]...destructive..."¹³⁹, that any recourse to special treatment allows both favourable and unfavourable treatment of women and that special treatment reinforces the assumptions about stereotypical roles of both men and women. Taking each of these in turn, equal treatment feminists are concerned that focussing on the differences between men and women divides us and seems to pit the interests of each group against the other. Similarly, if different treatment is permitted in the workplace and that different treatment involves greater cost or inconvenience to employers, they feel that there is a risk that employers will try to circumvent those costs and inconveniences by finding reasons not to employ women (which ultimately will disadvantage women as a whole). Williams' concern is that this issue is about how we "...define women's and men's places and roles in society..." and therefore any special/different treatment affects what we are suggesting those places and roles should be. By way of example, if we look to provide special treatment to mothers who have childcare responsibilities, then we are effectively excluding men from those responsibilities because we are not creating similar rights for them and so they will push those responsibilities to women.

2.2.2 The equal treatment approach poses particular problems for pregnant workers and it is the equal treatment that has often been pervasive in British law. As Guerrina has noted "...in British law the principle of equality implies a comparison between like entities (i.e. sameness) and thus struggles to deal with the concept of equality in

¹³⁸ <http://www.civilservant.org.uk/women-history.html>

¹³⁹ Wendy Williams "The Equality Crisis: Some Reflections On Culture, Courts and Feminism", 14 *Women's Rts L Rep* 1992, 151

difference. The British legal system has struggled to find the 'proper' place or the appropriate terms of reference to deal with 'conditions', such as maternity, that affect only the female workforce."¹⁴⁰

2.2.3 First, it is important to note that even those who advocate the "equal treatment" approach do not assert that pregnancy is not a biological difference between women and men – the issue is about how we deal with pregnancy in the workplace and whether it requires accommodation. The difficulty for advocates of the equal treatment approach is that, as an absolute minimum, pregnant workers will require time away from the workplace to give birth and to recover physically from this process. The only other category of worker who may also need time off is that of workers who are ill. As such, the equal treatment approach often results in pregnant workers being compared with those with an illness.

2.2.4 By way of example, proponents of the "equal treatment" approach suggest that, where an employer operates a scheme which provides income replacement in the event of inability to work for sick workers, such a scheme should also extend to pregnant workers. Their basis for doing so is that "...if both childbirth and a heart attack cause an inability to work and income loss, it makes sense to encompass both within a disability program designed to cushion the economic effects of temporarily inability to work."¹⁴¹ There are some difficulties with this approach: it does not provide any protection for pregnancy, it guarantees women only rights that men already have, the position appears to adopt a negative view of pregnancy that, and there are inherent problems in the requirement for women to be compared to men as this creates a male reference point. I shall consider each of these in turn.

No protection for pregnancy

2.2.5 Under the equal treatment approach, pregnancy as such receives no protection. This is because, as a female specific condition, there is no equivalent male condition. As has been explained previously in Chapter 1, pregnancy is a social good and therefore

¹⁴⁰ Roberta Guerrina, R. (2005) *Mothering the union*. Manchester: Manchester University Press, p144

¹⁴¹ Stephanie Wildman, "The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence", 63 *Or L Rev* 265 at 357

women who are pregnant should not be subjected to unjustified detriment arising from external factors. This would include not being penalised as a result of needing time off for ante-natal appointments or time to give birth and recover from this. Pregnancy is a uniquely female condition and one which does require some accommodation/recognition in the context of the workplace.

2.2.6 The issue of childcare seems quite different though in this regard. Both parents are equally capable of caring for a child and so, each should have similar entitlements in respect of that child. The equal treatment approach does not, therefore, seem to cause any problems in this regard.

Guarantees only rights that men already have

2.2.7 A problem with a comparison against a male norm is that it only guarantees women the rights that men already have. If men have limited, or no, rights in one area, and women need rights in this area, then the equal treatment approach will not secure women the rights that they need. As explained below at 2.2.19, because of the way in which the workplace has evolved, the normative standard that workers are held to is that of an unencumbered person (that is, an unencumbered man with someone to carry out all domestic tasks that might distract him from his work duties). Rights designed to reconcile work and family responsibilities were not necessary for this unencumbered worker and therefore do not exist.

2.2.8 In respect of pregnancy, the equal treatment approach is flawed because under it "...men and women are viewed essentially as interchangeable employees, and all causes of inability to work are treated in a uniform and sex-neutral manner."¹⁴² This does not reflect reality; men and women are not interchangeable in the pregnancy context because men cannot be pregnant. Further, pregnancy is different from other causes of inability to work: (i) as explained in Chapter 1, it benefits society and is essential; (ii) unlike other causes of absence, for example sickness, the employee will know (in most cases) in advance when she will need to take time off, and therefore can inform the employer of this so that arrangements for cover can be put in place, if necessary, in advance; and (iii)

¹⁴² Andrew Weissmann, "Sexual Equality under the Pregnancy Discrimination Act", 83 *Colum L Rev* 690 1983

the amount of time off that an employee can take as maternity leave is limited, unlike sick leave where the employee could be unable to work indefinitely, and so the employer can make arrangements for appropriate cover and also ensure that the employee has a job to return to.

Negative view of pregnancy

2.2.9 Pregnancy may be a positive experience for women, whereas a temporary disability is "...often considered to be a negative, sometimes even life-threatening, circumstance ..." ¹⁴³. As such, equating pregnancy with disability may have negative connotations. Further, it makes pregnancy seem unusual and a deviation from the normal pattern of human behaviour, when in fact pregnancy is "...a predictable, foreseeable condition that will occur among a substantial portion of working women." ¹⁴⁴ Statistics in the UK show that the very large majority of women will have children ¹⁴⁵. In addition, it seems strange to consider women's unique role in procreation as disability. As Gutierrez and Hernandez-Truyol have noted "...[t]his unique ability to create life is transmogrified into a *disability* simply because men cannot do it." ¹⁴⁶

2.2.10 Cox argues that the arguments against equal treatment in this regard are negated if we adopt the social model of disability, under which disability is not "an impairment located within an individual's body but ...the interaction between the individual's body and her social environment" ¹⁴⁷. She equates the struggle to include pregnancy within the workplace, whereby pregnant women are only excluded because the workplace has been designed around a male norm who cannot become pregnant, with the struggle to include those with disabilities within the workplace. On this basis, she asserts that we need to look to change perceptions of the norm "...to achieve the inclusiveness that would have naturally occurred had human culture historically viewed physically variant persons as legitimate workforce participants." ¹⁴⁸ Pregnancy can be seen to be similar to disability

¹⁴³ Mary Jane Mossman, "Feminism and the Law: Challenges and Choices" 10 *Can J Women & L* 1 1998, 9

¹⁴⁴ Dowd (n96), 702

¹⁴⁵ In 2012, 18% of women who were 45 were childless ("*Cohort Fertility, 2012*", ONS, 5 December 2013)

¹⁴⁶ Vivian Gutierrez, Berta Hernandez-Truyol, "Unsexing Pregnancy?" in Darren Rosenblum et al "Pregnant Man: A Conversation" *Yale Journal of Law and Feminism*, Vol 22, Issue 2, 2010 207-278, 230

¹⁴⁷ Jeanette Cox, "Pregnancy as "disability" and the amended Americans with Disabilities Act", 53 *BCL Rev* 443 (2012), 443

¹⁴⁸ *ibid*, 450

when a social model of disability is adopted. The way that the workplace has been constructed, ignoring the issue of pregnancy and making this invisible and a private matter means that pregnant women are unable to fully participate in the workplace in many instances, just as, under the social model of disability, it is not a person's impairment that causes them difficulties in the workplace, but the way the workplace has been created. As such, the social model recognises that an impairment is disabling because of the interaction between that impairment and the social world. I agree with Cox that the norm needs to be changed to incorporate pregnancy and to change from an unencumbered worker to one who has responsibilities outside the workplace. However, I disagree that pregnancy should be equated with disability. The two are very different. Pregnancy is significant not just for the woman carrying the child, but also the father of the unborn child. It is also, as argued in Chapter 1, a socially useful task. Characterising pregnancy as disability when pregnancy is also characterised as a choice for the individual makes it "...a private, negative, temporary deviation from a female employee's public, productive role – a personal indulgence in derogation of her responsibilities as a functioning worker."¹⁴⁹

2.2.11 In conclusion, the equal treatment approach does not appear to be useful or helpful in the pregnancy context, nor is it particularly useful in relation to childcare (because no-one else has rights that properly accommodate caring). That is not to say that it has not or that it will not be appropriate in other contexts, for example, securing access to employment. As Law has noted "...it is not possible to give a single answer to the question whether men and women are essentially similar."¹⁵⁰ Similarly, Adiba Sohrab has suggested that "[r]ather than having as our primary focus a rather abstract situation of 'equality in law', we should start from specific social problems that affect women, or different groups of women, and evaluate legal approaches, and anti-discrimination legislation, in terms of their usefulness in attacking these problems."¹⁵¹ I agree; the purpose of evaluating the equal treatment and different treatment approaches here is to

¹⁴⁹ Reiter (n69), 15

¹⁵⁰ Sylvia Law "Rethinking Sex and the Constitution", *U Pa.L.Rev* 955 (1984)

¹⁵¹ Julia Sohrab (1993) 'Avoiding the "exquisite trap": a critical look at the equal treatment / special treatment debate in law', *Feminist Legal Studies*, 1(2)-141-162, 143

enable us to understand whether either is appropriate for securing the rights that are needed for the reconciliation of work and family responsibilities, rather than seeking to argue that one particular approach is best to secure every right needed for women to be treated fairly in general.

Special Treatment

2.2.12 In the late 1970's, a different approach was adopted by some academics and commentators to the issue of gender equality. These academics and commentators essentially argued that men focus on personal achievement and their autonomy (or as referred to by Chodorow¹⁵² they define themselves by their "denial of relation to others") whereas women focus on an ethic of care and similarly they define themselves by reference to their relationships. What is arguably the leading text setting out this approach was written by Gilligan (*In a Different Voice: Psychological Theory and Women's Development*¹⁵³) and was published in 1982. The "different voice" feminists, such as Gilligan, argue that women's contribution, for example in terms of caring, should be recognised as being different (rather than less valuable) than the contribution of men. "Different voice" feminism is not the only approach to special treatment though and the special treatment approach does not inevitably accept that women think differently to men or that men do not share an ethic of care. Both Hill Kay and Law have argued that women should be treated differently from men where the need for such treatment arises because of a biological difference between the sexes (rather than because they speak in a "different voice").

2.2.13 Special treatment has the advantage of recognising the importance of issues, such as caring. As highlighted in Chapter 1, caring is not valued as the socially important task that is.

2.2.14 The "different voice" approach suggests that perhaps rights should be given to mothers only to allow them to care, since according to this approach, they share an ethic of care, which men do not. This type of argument suggests that women are better at caring

¹⁵² Carol Gilligan 'In a Different Voice: Psychological Theory and Women's Development' 1982, Harvard University Press

¹⁵³ Nancy Chodorow 'The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender' (1978), Yale University Press

than men and therefore that those types of task should naturally fall to women. Yet what the argument does not address is whether women are “naturally” better at care, or whether we have just been socialised to believe that this is the case. In response to “In a Different Voice”, Kerber asserted a view that the difference in the way that women reacted to situations was likely to be as a result of “...the distinctive socialization of young girls in a culture...which has long ascribed some social tasks to men and others to women...”¹⁵⁴. In other words, the reason that girls aspire, for example, to be housewives, rather than masters of industry is because those are the parameters that are seemingly set by society for their sex. Further, as Williams has noted, when it comes to care, women and men are judged very differently for their contributions¹⁵⁵. To conform to the ideal mother stereotype, a woman must be selflessly devoted to her children’s needs. A father need not meet this bar, indeed as described later in this chapter, men’s status is derived from their financial contributions to the family and thus if they care too much (such that this is a distraction from paid work) this can undermine their ability to meet the ideal father norm.

2.2.15 The “different voice” approach presents gender as absolute and the genders as opposites. As such, care is a gendered characteristic, one that only women possess. Yet, there are plenty of fathers who care for their children and the statistical evidence suggests that fathers want to spend more time doing so. This is inconsistent with the idea that women naturally care (which equally suggests that men do not). As I have argued in Chapter 1, special treatment, if only given to women, would be inappropriate because both parents are equally capable of undertaking the care of a child. Special treatment, whereby parents (rather than just mothers) are given additional rights and/or protections might be of some use. However, there would be significant drawbacks to any special treatment given to mothers in relation to childcare. This would merely perpetuate the privileging of the mother-child relationship, which is discussed below at 2.4.

¹⁵⁴ Linda Kerber “Some Cautionary Words for Historians”, *Signs*, Vol. 11, No. 2 (Winter, 1986), pp. 304-310

¹⁵⁵ Wendy Williams “*Unbending Gender: Why Family and Work Conflict and What to do About it*”, Oxford University Press, 2000

2.2.16 The approach adopted by Law and Kay focuses on biological difference, so does not have the difficulties highlighted above in relation to the “different voice” approach. Unlike childcare, pregnancy is a clear difference between women and men. It is also something that has an impact on a pregnant women’s ability to participate in the workplace (as constructed currently) as a result of her needing time off for childbirth and for recovery. As such, does the special treatment approach better accommodate pregnancy than the equal treatment approach?

2.2.17 Considering special treatment more generally (and not just “different voice” theories) there have been historic issues with special treatment being used to justify women being excluded from the workplace in protectionist measures that went far beyond what was genuinely necessary. Vogel has highlighted difficulties relating to protectionist measures to prevent reproductive damage, noting that “...some [women] found themselves excluded from jobs they wanted”¹⁵⁶ and that the concerns around reproductive harm “...not only reinforced sex segregation in the labor market, but it also increasingly became the basis for policies and practices that harmed women workers.”¹⁵⁷ Historically discussions relating to pre-pregnancy reproductive hazards have focused solely on the damage caused to female reproduction; this has resulted in women’s unique role in procreation being used to exclude women from certain workplaces. For example, in the case of *Page v Freight Hire*¹⁵⁸, the female claimant had not been permitted to drive vehicles containing the chemical DMF because she was a 23 year old woman. The manufacturer of this chemical had warned the employee's employer that the chemical was dangerous to women of child-bearing age, however exposure to it also could cause, amongst other things, liver and kidney problems, for both sexes, yet men were not excluded from transporting it.. Fredman has observed that “...the option of insisting on improving health and safety standards for all was simply not considered. The implausibility of the alternative option, that of excluding men from the work-place

¹⁵⁶ Lisa Vogel “Debating Difference: Feminism, Pregnancy and the Workplace” *Feminist Studies*, Vol.16, No.1 (Spring 1990), pp9-32, 12

¹⁵⁷ *ibid*

¹⁵⁸ [1981] ICR 299

because of such hazards, simply underlines the ease with which women can be marginalised”¹⁵⁹.

2.2.18 However, there is a further fundamental issue with “special” treatment; it still requires a comparative approach, whereby the reference point is the male norm (the difficulties that this poses for pregnancy and childcare are discussed below). Pregnancy and childcare remain something that is strange or different, thereby justifying the special treatment.

The reference point

2.2.19 A fundamental problem with both the equal treatment and special treatment approaches is the reference point that is used. When considering whether a woman should be treated in the same way as another worker, we are implicitly using a male standard. This hypothetical worker “...is an able-bodied person who should rarely get sick and who has someone else who can devote full time to taking care of children, food, laundry, repairs, errands and family illnesses”¹⁶⁰.

2.2.20 For women who are pregnant, it is impossible to meet this male standard of worker as they will need time away from work at the very least to give birth, and probably also during the pregnancy in order to attend ante-natal appointments. Under the male norm, pregnancy is seen as an “...inconvenient deviation from a male or androgynous norm...”¹⁶¹. As discussed earlier, however, pregnancy is not an unusual event; it is a “...normal moment in the human reproductive process specific to women”¹⁶². As men have been set as the standard against which all workers must be measured, and men cannot become pregnant, the only way that pregnancy can be characterised under this system is as a deviation, because it is not normal male behaviour to become pregnant. If women were the standard against which workers were measured, pregnancy, as a condition which affects a substantial proportion of women, would not be seen as a deviation; it would be seen as normal behaviour and workplaces would have developed

¹⁵⁹ Fredman (n79), p307

¹⁶⁰ Finley (n99), 1168

¹⁶¹ Reiter (n69)

¹⁶² Reva Siegal, “Employment Equality under the Pregnancy Discrimination Act of 1978”, 94 *Yale LJ* 942 1984-1985, 942

to accommodate it. We need to “...stop accepting men’s needs as determining all desirable ‘rights’ for both women and men and thus as constituting the standard for equality analysis...” as when we do so “... we will cease being so concerned about whether maternity leave is a ‘special right’ because it is not male oriented”¹⁶³. For parents who need to reconcile their family and work responsibilities, the difficulty is the idea that the norm is an unencumbered worker who has someone else to take “...care of children, food, laundry, repairs, errands and family illnesses”¹⁶⁴.

2.2.21 In relation to both pregnancy and childcare, the issue is the fact that the norm that has developed embodied traditional male values, that is someone who is unencumbered by responsibilities from the private sphere.

2.2.22 As many have noted, including MacKinnon¹⁶⁵, James¹⁶⁶ and Adiba Sohrab¹⁶⁷, the special treatment approach (just like the equal treatment approach) “...assumes that male needs establish the norm”¹⁶⁸. I argue below that the issue should not be about whether we adopt an equal treatment or special treatment approach to the difficulties facing parents in reconciling work and family responsibilities, but that we look to value pregnancy/childcare (and caring more generally) and that we should move away from the current “male” norm.

2.3 Issues for pregnancy and childcare in the current theoretical framework

2.3.1 There are certain ideas underpinning the current workplace parental rights that cause particular difficulty for pregnant workers and parents wishing to reconcile work and family responsibilities. These are examined in detail below, but essentially relate to the current norm and the idea of a private (domestic) sphere and a public sphere, which are entirely independent. In relation to the former, as Busby has noted “[m]easurement against a male norm and the resulting classification on women's physical characteristics

¹⁶³ Finley (n99), 1158

¹⁶⁴ Finley (n99), 1168

¹⁶⁵ Fredman (n55) “...the difference approach adopts the point of view of male supremacy on the status of the sexes. Simply by treating the status quo as “the standard”, it invisibly and uncritically accepts the arrangements under male supremacy.”

¹⁶⁶ James (n10), 56 “The difference model is of course still problematic because it attempts to ‘fit’ pregnancy and parenting into the existing framework of rights available and, in doing so, continues to present the unencumbered, non-pregnant and often male worker as the standard from which her difference ought to be measured...”

¹⁶⁷ Sohrab (n151), 157

¹⁶⁸ *ibid*

and physiological functions as 'different' colours the development and interpretation of related provisions"¹⁶⁹. This is arguably why the legislative provisions that are in place do not meet the needs of parents; because they are based on a false premise, that of women (being of the gender that is predominantly responsible for carrying out the task of caring) being viewed as "different" as a result of those caring responsibilities, when in fact, as argued in Chapter 1, the reality is that caring is a fundamental part of society (and one that has an impact on every (interconnected) individual).

The current norm

2.3.2 The current norm for a worker has developed over time and is based on a model of a worker who has no childcare (or other caring) responsibilities and who is not pregnant. As such, the features of the norm are that the worker works on a full-time basis and is able to dedicate himself to his work to the exclusion of all else. Busby suggests that: the main difficulty faced by those trying to reconcile work and care responsibilities "... is the inability of those engaged in the non-negotiable work of caring to conform to the practices ascribed by established and apparently unyielding structures surrounding paid work which dictate how, where and when it should take place"¹⁷⁰. Challenging the current norm, and in particular the requirement to work on a full-time basis and a worker's ability to dedicate himself to his work to the exclusion of all else, would have the effect of changing the expectations of how and when work should take place (but would not necessarily have any impact on where the work takes place). Both these features seem to cause the most difficulties for those who have childcare responsibilities and for pregnant workers.

Full-time worker

2.3.3 The meaning of the term "full-time" varies from industry and sector, and even between different jobs for the same employer¹⁷¹. The assumption that a "typical" worker will be able to work full-time hours has an impact on those who, as a result of childcare

¹⁶⁹ Busby (n51), p119

¹⁷⁰ Busby (n51), p63

¹⁷¹ This was acknowledged in the EHRC (2009) research report (Metcalf and Rolfe "*Employment and Earnings in the Finance Sector: A Gender Analysis*") which noted that the definition of full-time work used in official statistics is 30 hours per week but in fact employers tend to define a job as full time if its basic hours are the standard hours for full time hours, which are often between 37.5 and 40 hours per week but vary across employers and even within different roles in the same organisation.

responsibilities, are unable to do so. This disadvantages women because of the fact that they tend to have primary responsibility for childcare, and therefore are more likely than men to need, or want, to work part-time. The issue for parents who wish to reconcile work and family responsibilities is not though just the number of hours that employers require workers to work, but also when and where those hours have to be worked.

Dedication to the exclusion of all else

2.3.4 The current norm requires that workers demonstrate that they can dedicate themselves to the workplace to the exclusion of all else. I agree with Crompton that, "...in many if not most organisations, the 'ideal' career worker will still be an individual who is prepared to demonstrate their commitment to the employer by meeting organisational demands (for example, by meeting personal or group targets), even if this means working long hours"¹⁷². As argued in Chapter 1, long working hours cause particular difficulties for parents trying to reconcile their work and family responsibilities and, given the fact that women currently bear a greater burden in respect of the time spent caring, means that many women are viewed, in the workplace, as being less valuable or dedicated to their careers.

2.3.5 One of the particular problems that face those with childcare responsibilities is that, unlike some (but not all) other characteristics protected from discrimination under the Equality Act 2010 (for example race¹⁷³, sex, sexual orientation), childcare responsibilities may have an impact on a worker in the workplace¹⁷⁴. This might be because the worker chooses to work part-time or to follow non-traditional working patterns (ie working from home or working hours other than 9am to 5pm), or it might be because the worker occasionally needs time off to care for his/her child, for example, if the child is unwell. It might also mean that, because of the norm, the worker is seen as being less flexible. For professional workers this might be because, for example, the

¹⁷² Crompton (n7), p87

¹⁷³ Race alone is unlikely to have an impact on an employee's ability to participate in the workplace, although I acknowledge that ethnicity may be associated with religious or cultural obligations which impinge at work.

¹⁷⁴ Arguably the protected characteristics of religion or belief, and even disability may actually impact on a worker in the workplace. For example, a worker who is required to observe a particular prayer-time or not to work at a particular time of day may require an accommodation by the employer. Similarly, a worker who is disabled may require time off work in order to attend medical appointments.

worker is not always be able to answer a query or work on a document on their day off. For blue collar workers, this might be because the worker is unable to operate a flexible schedule and come in to work on a weekend when their childcare (whether formal or informal including: school, nursery, care by relatives) is not available.

2.3.6 MacKinnon suggests this is part of the invisible gendering of the workplace. It indeed appears to be so: most employers require their workers to conform to the norm (that is someone who does not have childcare responsibilities that impinge on their ability to provide maximum flexibility (including being available whenever the employer chooses)). As such the way in which a job is structured is "...with the expectation that its occupant would have no child care responsibilities"¹⁷⁵ which is inherently gendered. As a result of the gendered nature of the workplace "...at least in some instances, women are hampered by caregiving in ways that non-caregivers (male and female) are not in fulfilling common work obligations"¹⁷⁶. This is true because the norm requires the worker to dedicate themselves to work to the exclusion of everything else, irrespective of how reasonable or unreasonable the demands of the workplace might be. Those that cannot satisfy this norm, for example because of childcare responsibilities, are seen by their employers as less valuable workers than their colleagues who can. We need to challenge the assumption that, to be a model employee, a person has to dedicate himself/herself to work to the exclusion of everything else. Travis suggests that we need to require "...employers to redesign workplaces that have been built around unstated norms of workers (typically men) who lack significant caregiving responsibilities"¹⁷⁷ and also that we need to "...restructure the entire workplace around a caregiving worker norm"¹⁷⁸. In order to do so, we need to overcome some of the issues set out in this section; I consider below at 2.5, how this could be achieved.

¹⁷⁵ Fredman (n55) p37

¹⁷⁶ Rachel Arnow-Richman "Accommodation subverted: the future of work/family initiatives in a 'Me, Inc.' World", *Texas Journal of Women and the Law*, Volume 12, 345, 2002-2003, 355

¹⁷⁷ Michelle Travis "Equality in the Workplace", 24 *Berkeley J Empl & Lab L* 285288, 288

¹⁷⁸ *ibid*, 289

2.3.7 Abrams has expressed concern that changing the norm "... will be financially costly as well as disorienting"¹⁷⁹. It is true that there may be costs associated with these measures, however it is important to note that there is also a cost associated with not introducing them. This is because, as set out in Chapter 1, if parents are unable to combine work and childcare, then they may be forced either to opt out of the labour market, or to change to lower-paid work which allows them to work flexibly. As such, the crucial question is not whether there are costs associated with changing the assumption that one worker will prioritise work whilst the other cares for the children, but whether such costs are reasonable.

2.3.8 If, because of the current norm and the structuring of the workplace around this norm, the impact of caring is that mothers (and fathers who choose to undertake care) are not valued by employers, we need to acknowledge the impact of caring, yet we do not do so. This appears to be why there is so little progress in achieving work/family reconciliation, a point that is made by Busby¹⁸⁰.

2.3.9 The concept of the normative worker – someone who can dedicate himself to work to the exclusion of the home sphere – not only hurts women in the workplace but it also hurts men in relation to their home/parenting responsibilities. Men are effectively side-lined and excluded from playing the role in their children's lives that many would like to play. Research by the EHRC showed that 62% of fathers thought that fathers should spend more time with their children¹⁸¹. Williams suggests that, addressing work-life balance issues is not just about transforming women's roles, but also about transforming men's roles too¹⁸². This is true for a number of reasons: men are often effectively excluded from rights to leave through the low levels (or lack) of pay in respect of these rights; and there are pervasive assumptions about the role of women in parenting (discussed further below at 2.4), and these assumptions so far have not been dispelled by the measures taken to try to facilitate a more equal sharing of parental responsibilities,

¹⁷⁹ Kathryn Abrams, "Discrimination and the Transformation of Workplace Norms", 42 *V and L Rev* 1989, 1183-1248, 1225

¹⁸⁰ Busby (n51)

¹⁸¹ "Working Better: Fathers, family and work – contemporary perspectives." Equality and Human Rights Commission, Research summary 41, October 2009

¹⁸² Williams (n155)

such as through the introduction of Additional Paternity Leave (“**APL**”) (discussed in more detail in Chapter 3).

Separate spheres

2.3.10 The first thing to note is that “[t]he ideology of the separate spheres is a social construct: there are no natural fixed spheres”¹⁸³. This is important because it means that there is no reason that work and home have to be separate spheres, it just so happens to be this way because of the way that society has developed. Men have not, historically, needed rights to allow them to reconcile work and family because family responsibilities, such as childcare, and domestic tasks, such as cooking, fell within the private sphere and were the responsibility of their wives (who did not work outside the home). Consequently, the male worker norm has developed as a person who has someone else to undertake familial and domestic responsibilities allowing him to concentrate his energies on work. It is also important to note that the problem of the separate spheres may affect both men and women but women are likely to be more disadvantaged by it in the workplace because, as set out in Chapter 1, they tend to have primary responsibility for childcare. Men may be disadvantaged by the concept in the home because they may have less opportunity to actively participate in the care of their children.

2.3.11 There are many problems for childcare with the concept of two separate spheres. Firstly, if the spheres of home and work are seen as separate, then each is seen as imposing competing demands on the time of the employee. Consequently, any time that a parent spends away from the workplace (whether this is time off in the form of leave or a reduction in their working hours) is viewed, at worst as having a negative effect on the employer, or at best as not benefitting the employer in any way. Because the spheres are viewed as separate, it is possible to exclude “...the values, needs and perspectives of one from recognition in the other”¹⁸⁴. Employers can ignore the additional skills, or the different perspective, that a worker might bring to a job as a result of caring for a child. The fact that the two spheres are seen as separate also means that neither needs to take account of the other (for example, the fact that parents might need some adjustments to

¹⁸³ Olans Brown et al (n100), 588

¹⁸⁴ Finley (n99), 1165

their working patterns as a result of their childcare responsibilities can simply be ignored by the employer), and so the work sphere has been structured in a way which does not take account of the needs of parents or of pregnant workers. Despite the fact that nearly half of employees in the UK are now women¹⁸⁵, this position has not changed. “The very sense of the workplace has been defined, not by women, and not in our terms. To be in the workplace is to enter a male-privileged world. Even the notion of the workplace which exists outside the home privileges maleness, associating work with male values and culture”¹⁸⁶.

2.3.12 Further, as the two spheres are viewed as separate (rather than being interconnected), it is possible to prioritise one over the other. In the work sphere workers are expected, in order to demonstrate “commitment” to their careers, to dedicate themselves to work above all else. As discussed above, this can cause difficulties for those with childcare responsibilities. There also appears to be a view that one sphere (the public) is superior to the other (the private). As James has noted a “...related implication of the dichotomy is the inherent way that it fails to recognise or value, or create a space for the recognition and value of, the private sphere in general and women’s unpaid domestic work in relation to childbearing, childcare and nurturing in particular.”¹⁸⁷ This again is, I would argue, in part as a result of a failure to value parenting. If we do not see the value in such tasks, then it is unsurprising that the work/public sphere is seen as superior to the private/domestic sphere.

2.4 Privileging of mother-child relationship

2.4.1 As set out in Chapter 1, whilst only women can be pregnant, both men and women can be parents and both have the capacity to care. Currently the care of children is predominantly undertaken by women. If we are to allow mothers to properly reconcile work and family responsibilities, this needs to change. However, the current legal

¹⁸⁵ According to the Office for National Statistics, in the period from September to November 2014, 13.2 million of employees were men and 12.9 million were women. (“EMP01, full-time, part-time and temporary workers”, ONS, 21 January 2015)

¹⁸⁶ Stephanie Wildman. “Privilege in the Workplace: The Missing Element in Antidiscrimination Law”, 4 *Tex J Women & L* 171-188 1995

¹⁸⁷ James (n15), p14

framework, with its privileging of the mother-child relationship (rather than parent-child) and perpetuation of ideologies of motherhood, makes this task almost impossible.

2.4.2 What do we mean by the ideologies of motherhood? Essentially this is the idea that all women are naturally capable of being carers of children, that there is a special relationship between mother and child and that mothers provide the best care for their children. As many, including McGlynn¹⁸⁸ and Fredman¹⁸⁹, have noted, the ideologies of motherhood are deep-rooted and were supported by psychological studies carried out in the post-war period, which found that separation from mothers resulted in emotional damage¹⁹⁰. These studies reaffirmed society's thinking at the time and appear to have been accepted unquestioningly. However, the studies related to children who had been separated from both parents as a result of having been evacuated to parts of the country that were deemed to be at less risk of bombing. It is difficult, therefore, to assess the degree of emotional damage that these children suffered simply as a result of being separated from their mothers, as opposed to the stress of being moved to an unfamiliar place with unfamiliar people and general anxieties about the war and its consequences. Whilst there is now evidence to disprove the ideologies of motherhood and evidence which supports the crucial role that both parents play, these ideologies are difficult to dispel, not least because they are perpetuated by the legislation that is designed to facilitate work/family reconciliation, as well as the case law that has arisen from this.

2.4.3 I consider in greater detail how the current gender-specific rights reinforce the ideologies of motherhood when I critique each right, but, in short, the legislation provides for long periods of leave for mothers (in the form of maternity leave), whilst entitling father to significantly shorter periods (in the form of paternity leave). Whilst fathers may now be eligible for longer periods of leave (in the form of Additional Paternity Leave or, where a child is born after 5 April 2015, in the form of Shared Parental Leave), this is

¹⁸⁸ Clare McGlynn, 2001. "European Union family values: ideologies of "family" and "motherhood" in European Union law", *Social Politics*, 8(3), 325-351

¹⁸⁹ Fredman (n79)

¹⁹⁰ John Bowlby (1951) "Maternal care and mental health" *Journal of Consulting Psychology* 16(3), 232, John Bowlby (1956) "Mother-child separation", *Mental Health and Infant Development* 1, 117-122

contingent (in most cases¹⁹¹) on the mother surrendering part of her entitlement and is a relatively recent development (particularly when taken in the context of the long-standing assumption that a mother can provide the best care for her child). Making this contingent in this way still has the effect of emphasising the alleged “special relationship” between mother and child. This language is also found in the case law relating to these issues, particularly in cases determined by the CJEU. In *Ulrich Hofmann v Barmer Ersatzkasse*¹⁹², a father was seeking to argue that a failure to pay him for a period of leave that he had taken to care for his new child whilst the mother of the child returned to work amounted to a breach of equal treatment. However, the CJEU held that there was no breach of equal treatment because the purpose of maternity leave (and not parental leave) was to “protect the special relationship between a woman and her child”. Similarly, in *Abdoulaye v Régie Nationale des Usines Renault SA*¹⁹³ the plaintiff, Mr Abdoulaye, tried to argue that a payment made by Renault to its female employees after they took maternity leave amounted to sex discrimination. (This payment was in addition to pay that they received during the leave). Mr Abdoulaye argued that the birth of a child was a “...social event, which concerns the whole family, including the father” and, as such, the payment should be given to employees who had had a child, irrespective of the employees’ sex. The language of “special relationship” has been repeated in numerous cases¹⁹⁴. However, as McGlynn has observed “[i]n each case, no explanation was given of this statement, why it was deemed necessary, nor why the “special relationship” was relevant to the justification of the grant of maternity leave or why the need for child bonding was exclusive only to mothers”¹⁹⁵. This repeated use of the term “special relationship” in the decisions of the CJEU shows just how dominant this ideology is.

2.4.4 Not only can the ideologies of motherhood be found in the case law of the CJEU, but it can also be found in documents from another European Institution: the European

¹⁹¹ There is an exception where the mother dies, such that the father becomes entitled to her leave. (Part 1 of the Schedule to the Shared Parental Leave Regulations 2014)

¹⁹² Case 184/83, [1984] ECR 3047

¹⁹³ C218/98, [1999] ECR-I 5723

¹⁹⁴ These include, but are not limited to: *Webb v. EMO Air Cargo (UK) Ltd (No2)* (C32/93, ECR-I 3567, paragraph 20), *Brown v. Rentokil* (C394/96, (1998) ICR 790, paragraph 17), *Caisse nationale d'assurance vieillesse des travailleurs salariés v Thibault* (C136/95, ECR-I 2011, para-graph 25) and *Boyle v Equal Opportunities Commission* (C411/96, [1998] ECR-I 6401, paragraph 41).

¹⁹⁵ McGlynn (n188), 336

Commission and, specifically, its proposals to amend the Pregnant Workers Directive. Whilst these proposals have now been withdrawn¹⁹⁶, the approach taken by the European Commission is one of the privileging of the mother-child relationship and a bias towards mothers, rather than fathers (or parents), caring for their children.. In the Explanatory Memorandum on these proposal¹⁹⁷, it appears that the view taken is one in which women take primary responsibility for childcare, with men's role being seen as peripheral. This is because the proposals include an increase in the minimum amount of maternity leave (which is available to mothers only) from 14 to 18 weeks, whilst ignoring the impact of this proposal on fathers. In addition, because there is no requirement for this period of maternity leave to be paid (the proposals contained a recommendation that there be full pay, but the requirement would only have been that maternity pay be at no less than the rate of sick pay), having an extended period of leave available only to the mother could result in the father needing to work additional hours during the maternity leave period in order to make up for the drop in household income as a result of the decrease in the mother's wages. As such, the proposals do not seem to help men to achieve a better reconciliation between work and private life, and in fact may result in a reduction in the amount of time that men are able to spend with their children. This is the wrong approach; we should be enabling both parents, rather than simply mothers, to actively participate in the care of their children.

2.4.5 Whilst I accept that in relation to pregnancy, women do have a unique ability, there is no reason for the language of “special relationship” to be used in this context. In this regard, I agree with McGlynn that “...pregnancy-related rights should not be justified by reference to ideologies about motherhood”¹⁹⁸. The purpose of protecting pregnant workers (both in relation to health and safety considerations and to allow them time off to recover from birth) should be by reference to their biological uniqueness.

¹⁹⁶ European Commission Press Release “REFIT – Commission making EU law lighter, simpler and less costly”, 18 June 2014, http://europa.eu/rapid/press-release_IP-14-682_en.htm

¹⁹⁷ “Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding”, Brussels, COM(2008) 600/4, SEC(2008) 2526, SEC(2008) 2527

¹⁹⁸ McGlynn (n188) 336

2.5 What should the theoretical framework be?

2.5.1 Neither the equal treatment nor the different treatment approach seem to fully resolve the issues faced by pregnant women in dealing with issues relating to pregnancy; is there an alternative approach? Scott has suggested that “[w]hat is required...is a new way of thinking about difference, and this involves rejecting the idea that equality-versus-difference constitutes an opposition.”¹⁹⁹ She argues that by dividing matters down gender lines, we obstruct differences within these groups and that we should think about people as individuals with individual characteristics. Rosenblum has made similar arguments, noting that “[a] clear divide between “men” and “women” does not exist. Although most people accept that there are two sexes “male” and “female”, these categories actually contain a myriad of genders, formed genetically, biologically and culturally.”²⁰⁰ As with the arguments of Scott, the idea is that each individual may have “male” and “female” attributes and therefore defining people down lines of sex does not take account of their full range of needs. Gender has been constructed in a binary fashion, when it is more akin to a continuum. In respect of pregnancy, the issue is about securing rights for pregnant women, who are a subset of “women”; not all women want to be, or will become, pregnant. However, these arguments do not seem to be able to address the reason that pregnant women or those who wish to actively participate in child-rearing are disadvantaged in the first place. This seems to be caused primarily by having men as the reference point for the treatment of women in the workplace and, specifically, the norm used, which is essentially an unencumbered (male) worker with someone (female) at home in the private sphere, who takes care of all the domestic tasks, including care of any dependants. We need then, to change the norm and to deconstruct the divisions between the public and private spheres.

Changing the Norm

2.5.2 There are two particular difficulties with the norm: (i) it is a non-pregnant worker and (ii) it is an unencumbered worker.

¹⁹⁹ Joan Scott “Deconstructing Equality-versus-Difference: Or the Uses of Poststructuralist Theory for Feminism”, *Feminist Studies*, Vol 14, No. 1, Spring 1988

²⁰⁰ Darren Rosenblum, “Unsex Cedaw, or What’s Wrong with Women’s Rights”, *Columbia Journal of Gender and Law*, Vol. 20, 98

Pregnant workers

2.5.3 Equality means treating men and women the same, however, as Joan Williams has noted this can only take place after we have deconstructed "...the existing norms defined by and around men and masculinity, and reconstruct[ed] existing institutions in ways that include the bodies and traditional life patterns of women"²⁰¹. This is what I am attempting to do by changing the norm to incorporate the experiences and needs of pregnant workers in the workplace. Incorporating pregnancy into the worker norm might arguably be more easily achievable if, rather than having a long leave of absence (as is the current model under GB law), time off by way of maternity leave was for the short period of time that is necessary solely to allow a mother to recover from childbirth. As I argue below, there could then be a longer period of leave to allow both parents to spend time with their new child. This model would require a separation between pregnancy and childcare. Given this is a departure from the current model where women have a period of maternity leave that allows them both to recover from childbirth and to care for their child, it seems pertinent to deal with the issue of separating these two things here.

Separation of Pregnancy and Childcare

2.5.4 As is described more fully in Chapter 3, under the current regime in GB, mothers are automatically entitled to maternity leave of up to a year following the birth of a child. Fathers, on the other hand, are usually (subject to meeting certain qualifying requirements) entitled to a maximum period of six weeks leave (being a maximum of two weeks' paternity leave, and four weeks' parental leave²⁰²). Only if the mother surrenders some of her leave are fathers entitled to any leave over and above this amount (six months in the form of Additional Parental Leave ("APL") where the expected week of childbirth for the relevant child started before 5 April 2015 or 50 weeks of Shared Parental Leave ("SPL") where the expected week of childbirth for the relevant child started on or after 5 April 2015). As discussed earlier, this is due to the privileging of the mother-child

²⁰¹ Joan Williams "Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism", 63 *Hastings LJ* 1267 (2011-2012), at 1280

²⁰² See Chapter 5 for details of parental leave entitlement. Under the default scheme, the maximum in any given year would be four weeks.

relationship, rather than valuing of the social function of parents. The current approach reflects stereotypes about the roles of women and men under which women's role is to care. This view "...holds the mother inevitably responsible, and the father exempt from responsibility, for the nurturing of young children"²⁰³. As maternity leave is for a period of up to a year, it clearly is not in place just to allow women to recover physically from the birth of a child. The rationale for having an extended period of leave is to allow a mother the opportunity to care for, and bond with, her new child. There is no reason that a mother should be given the opportunity to bond with her new child, but the father should not. Not only does this approach perpetuate these cultural stereotypes, but it also means that women are seen as more costly to employ because they entitled to take such long periods of leave²⁰⁴. If both parents were able to take this period of leave (by which I mean that both have the right to the leave and that there are no significant financial or other barriers to taking this), and if they did so in practice, then it might make women more employable as employers could expect that both male and female employees might take leave to care for a new child. Although in theory both male and female employees can take up to 6 months' leave, as a result of the low uptake of APL (the reasons for which are examined in Chapter 3) and the low anticipated uptake of SPL by fathers (examined in Chapter 4), employers are currently likely to expect that only women will take long periods of leave to care for a child.

2.5.5 Pregnancy is a condition which is unique to women. There is, therefore "a need to be sex specific when considering pregnancy..."²⁰⁵. However, as many have advocated, there should be a "a bright line between pregnancy and child care that requires the provision of any available childrearing leave to both parents."²⁰⁶ When pregnancy and child-rearing are conflated, the result seems to be that responsibility for both falls to

²⁰³ Wendy Williams "Equality's Riddle: Pregnancy and the Equal Treatment / Special Treatment Debate" 13 *NYU Rev L & Soc Change*, 325, 1984-1985, at 355

²⁰⁴ "...a law demanding that employers provide pregnant workers with four months leave with pay would very likely have an adverse effect on women's employment opportunities." Law (n150), 1032

²⁰⁵ Clare McGlynn. 2001 Reclaiming a feminist vision: the reconciliation of paid work and family life in European Union law and policy. *Columbia Journal of European Law*, 7 (2), 241-272, 257

²⁰⁶ Herma Hill Kay (1985) 'Equality and difference: the case of pregnancy', *Berkley Women's Law Journal*, 1: 1-38, 34

women because only women have the capacity to bear children. Therefore, separating the two seems to have some advantages.

2.5.6 Before moving on though, we need to consider one other thing: breastfeeding. This is the only fundamental difference between the ability of a man and a woman to care for a new child. It could, therefore, be used to construct an argument that women should be given longer leave than men since only they can breastfeed their child. I would argue that it is not necessary to have an extended period of maternity leave that can only be used by the mother to allow her to breastfeed. Breastfeeding is a matter of choice²⁰⁷ and not all women will be able or will choose to breastfeed their child. Currently whilst 78% of mothers breastfeed to begin with, by six weeks this number has fallen to 22%, by four months it has fallen to 8% and by six months it is negligible²⁰⁸.

2.5.7 Parents who choose not to breastfeed for extended periods of time are in the majority. They should not be disadvantaged by leave which is reserved exclusively for the mother for no other reason than to allow her to breastfeed. It should be a matter of personal choice for the parents over who cares for a baby; this should not be dictated by allowing only one parent a period of leave. Also it is important to note that it is possible to work and breastfeed, subject to appropriate adjustments being made to the workplace to facilitate this. A short period of maternity leave would not adversely affect those that wish to breastfeed their children so long as this was accompanied by a longer period of leave that can be used by either parent.

2.5.8 Having justified my approach to separating pregnancy from childcare, I now wish to turn back to the question of how we incorporate the experience of pregnancy into the norm. One commentator, Abrams,²⁰⁹ has suggested that we should seek to incorporate female experience and specifically pregnancy/maternity into the male norm. She suggests that employers could implement a mandatory leave policy, whereby all

²⁰⁷ In order to be able to make an informed choice, the mother must be aware of the benefits of breastfeeding and to that end Article 24 of the United Nations' Convention on the Rights of the Child provides that "State Parties shall take appropriate measures to ensure that all segments of society...are informed [of] the advantages of breastfeeding." Whether current provision in relation to information and support in the UK is adequate is outside the scope of this thesis.

²⁰⁸ Fiona McAndrew et al, "Infant Feeding Study 2010", *Health and Social Care Information Centre and IFF Research*

²⁰⁹ Abrams (n179)

employees are required to take a period of leave for a year in any seven year period. With a shorter period of leave reserved exclusively for mothers, such a drastic measure would seem unnecessary. I also question whether it is practicable or would have the desired effect. whilst men would only be required to take leave once in every seven years', women having children might take maternity leave more frequently than this. It would also have the difficulty of either the employer needing to pay the employee for a year when s/he was not working or the employee being forced to take an unpaid absence for a year; neither seem to be particularly attractive. This approach is also unlikely to address the issue of society's failure to value pregnancy and parenting. In fact, it could undermine this, since arguably taking leave due to the birth of a child could be seen as equivalent to another employee taking a year's leave for no particular reason. Pregnancy and parenting may enable parents to develop skills that are useful in the workplace, including, but not limited to change management, multi-tasking, prioritising, etc, but because of the separate spheres, it is possible for such skills to be disregarded. If maternity leave were for a short period of time of, for instance, eightweeks (I justify this length of leave at 2.5.20) then it might be viewed as being no less inconvenient to employers than the annual leave entitlement that all workers have.

Unencumbered worker

2.5.9 One of the problems for parents with the current norm, discussed above at 2.2.19, is the assumption that an employee will work the employer's normal working hours at such times that the employer has determined (and these have been determined to suit the needs of a worker who does not have caring responsibilities). One way to address this issue would be to change current working patterns. In some roles the working hours that are the employer's standard may never have been given any real consideration – for example, many employer's standard days will be 9am to 5pm simply because that is the accepted norm, rather than for any other reason. These standard hours may not actually benefit the employer – workers may be required outside these hours or there may be no reason why the work has to be done between these hours. Allowing a worker flexibility over when they actually do the work for their employer may assist in combining work

and childcare/parenting. For example, a worker may start work early in the morning, before their children are awake (at home), then take a break for a couple of hours whilst they get the children ready for school/nursery/other childcare and then continue working until they collect the children from their childcare, but still do a “full” working day. If enough people were to work flexibly, then the potential of flexible working is that it could change the norm. Whilst in GB there is currently a right to request flexible working, for reasons set out in Chapter 4, currently that right is not sufficient to achieve this change, in part because the right is relatively weak, being only a right to ask for flexible working.

Results only work environment

2.5.10 An alternative approach to the problems faced by parents is for working patterns to be changed entirely (rather than just for those individuals who request flexibility). One way in which this could, theoretically, be achieved is through the use of a results-only work environment (“**ROWE**”), which was co-created by Thompson and Ressler in 2003. Essentially the idea behind ROWE is that employees should be free to determine how they work (both when and where) so long as they are achieving results. One study from the retailer GAP showed that a pilot of ROWE in part of the head office function increased employee engagement scores by 13% (GAP routinely surveyed staff prior to the introduction of ROWE to determine employee engagement) and reduced employee turnover by 50%, which in turn resulted in significant savings in recruitment costs²¹⁰. As Moen et al have noted “ROWE differs from more common forms of flexible working in that flexibility becomes the standard way of working, not an exception granted by a supervisor”²¹¹. If everybody is working flexibly, then the disadvantages associated with it, for example, lower chances of promotion due to failing to comply with the norm, would be negated. It would, therefore, result in a significant shift in the ideal worker norm; no longer would it matter where an employee worked or the hours that they worked, so long

²¹⁰²¹⁰ GAP Inc. Case Study: Quality and Productivity Through Trust, [gorowe.com](http://info.gorowe.com/Portals/170696/results_only_work_environment_gap_case_study.pdf) (http://info.gorowe.com/Portals/170696/results_only_work_environment_gap_case_study.pdf)

²¹¹ Phyllis Moen, Erin L Kelly, Eric Tranby, Qinlei Huang “Changing Work, Changing Health: Can Real Work-Time Flexibility Promote Health Behaviors and Well Being?” *Journal of Health and Social Behavior*, Vol. 52, No. 4 (December 2011), pp 404-429, at 423

as they achieve results. However, the problem with the literature on ROWE is that it fails to explain how “results” can be measured and thus how success by an employee is defined. In many roles without reference to hours worked it may not be clear what “result” is expected on a daily, weekly or even monthly basis.

2.5.11 Grabe has highlighted one significant drawback with ROWE: “[m]any corporations simply do not have the technological means or the nature of the business requires personal relations”²¹². Finally, in terms of mandating change in the workplace, it would seem difficult to legislate to mandate that all employers adopt ROWE, not least because, as identified above, not all workplaces will be capable of doing so.

2.5.12 ROWE, therefore, does not seem to be an option that could be mandated for all employers. The idea does raise an interesting question though: should rights, such as flexible working, be available to all workers, or just those with care responsibilities? The advantage of providing universal benefits is that, in theory, the stigma attached to the use of a benefit (for example, the loss of face time in the case of working from home) should be negated as everyone uses the benefit. The difficulty, though, is that extending the rights to everyone will not result in everyone using them: only those who need to exercise the particular right will. In the case of rights such as flexible working, this is most likely to be those with caring responsibilities. This means that, in practice, there is unlikely to be a significant change in who exercises the right in question and therefore little change in the negative connotations associated with the particular right. It is for this reason that Clarke has noted that “[u]niversal workplace accommodations may be just as likely as care taking accommodations to shift costs onto disadvantaged groups”²¹³. If employers do not employ those with young children because they are concerned that they may wish to work part-time or may take time off to care for their child, extending the rights to flexible working or to leave, is unlikely to result in any change in this (which is a ‘cost’, albeit an indirect one) for parents unless in practice others were also to use these rights.

²¹² Erin Grabe “Gradual Return to Work: Maximising Benefits to Corporations and their Caregiving Employees”, 37 *Iowa J Corp L* 699

²¹³ Jessica Clarke, “Beyond Equality? Against the Universal Turn in Workplace Protection”, 86 *Ind LJ* (2011) 219

2.5.13 There is also the difficulty of dilution; if everyone can use a particular right, the reason that parents need the right can be overlooked. This can be seen in relation to the extended right to request flexible working where there is no provision in the legislation requiring an employee to explain the reason for the request. This means, in theory, that if two competing requests (i.e. a situation where an employer can only grant one request and has two), the employer does not need to determine the requests on the basis of which worker has the greater need. By way of example, it is possible to have one employee requesting to work from home one day per week to be able to collect a child from childcare arrangements (with the consequence that if she cannot, she cannot continue in her role) with another employee's competing request being because s/he wants to be able to play golf. Employers are likely to be reluctant to be seen to be making value judgements about the value of parenting or caring as compared to other activities, such as, for example, an employee choosing to stand for political office. This means that the value of these rights to parents can be lost. Another difficulty is that universal protections ignore the reason why protection is needed in the first place; in the context of parental rights in the workplace, this is because of the gendered nature of family responsibilities and the fact that parents who care are disadvantaged by the workplace. It is for this reason that in Chapter 7, I argue that there should be a duty to accommodate care responsibilities, rather than a duty for all employers to restructure the workplace to suit the general needs/wants of their workers.

2.5.14 The idea of a worker being unencumbered is unlikely to be resolved solely by changing working hours or the location where work takes place. The other issue that faces those with childcare responsibilities is an occasional need for time off. Parents may need time off to deal with emergencies relating to a child's care (for example, if a child is sick or if a school is closed). Equally, they may also need time off for more routine childcare needs – such as care during the school holidays. Rather than having a set amount of leave that can be taken by each parent, it would be preferable for employers to have to make reasonable accommodation of this type of need. Just as with working patterns, this would assist with dispelling the idea that the home and work spheres are

separate. Further, employers need to appreciate that, as set out in Chapter 1, there is an increasing number of workers who need to combine both work and family responsibilities. The norm, therefore, needs to change to recognise this. As Herring has recognised, “[i]f we started with the norm of the family-committed worker, there would be no special treatment on offer”²¹⁴. This would significantly help with the way that family responsibilities are perceived by those workers who either have none, or who have someone else who deals with these (and who can often resent the “special” treatment that is afforded to those with a need to reconcile work and family) and also would remove the disincentive from employers engaging those workers who have these needs.

Deconstruction of separate spheres

2.5.15 One of the difficulties with the current workplace is the fact that care responsibilities are seen as private and therefore do not need to be taken into consideration. This needs to change. Wynn has suggested that “[t]ackling equality issues in this wider context will help to redraw the boundaries between public and private spheres by creating a more supportive environment at work”²¹⁵. Whilst I agree that it is necessary to tackle equality issues in the wider context of the norm, I am not convinced that there is a need to redraw the boundaries, so much as to abandon them altogether. The boundaries of the separate spheres are already being redrawn, but by work beginning to impinge on the domestic sphere through new technology. One research study suggests that office workers spend an additional 1.2 hours per day sending emails or making work calls whilst not in working hours²¹⁶ and there is increasing concern about workers becoming addicted to checking their hand held devices²¹⁷. This shows that the idea of the two spheres as separate is an illusion. One way to begin to deconstruct the concept of the separate spheres would be for there to be a requirement for employers to consider what impact their practices will have on workers’ care responsibilities. It is for

²¹⁴ Herring (n54), p254

²¹⁵ Michael Wynn (1999) ‘Pregnancy Discrimination: Equality, Protection or Reconciliation?’, *Modern Law Review*, 62(3): 435-447, 447

²¹⁶ Reported in the Telegraph, 31 October 2012, “Smartphones and tablets add two hours to the working day”

²¹⁷ Mark Taylor, a consultant adult psychiatrist had developed a screening test for pathological addiction – “Are you addicted to your ‘crackberry’”, *BMJ*, vol. 334, No. 7587, Feb 3, 2007

this reason that, in Chapter 7, I argue that there should be a duty to accommodate care responsibilities.

Is an ethic of care necessary?

2.5.16 Above I have argued that, in order to break down the barriers between the supposedly separate private and public spheres, there should be a duty to accommodate care responsibilities. However, some, including Herring, have argued that there needs to be a more fundamental change to the way that we deal with issues relating to care. The purpose of such a change would be to change the very way that we think about rights and responsibilities so that, rather than seeing rights as being attached to individuals, rights and responsibilities would be derived from relationships. This would entail a recognition of the fact that "... we all have needs and that caring for others in meeting these needs is a universal experience"²¹⁸. Under an ethic of care, there would be a right to care, as well as a right to be cared for. This is somewhat wider than the scope of the accommodation that I am advocating. Busby has noted that under such a model, "...because responsibility for the provision of such support rests with the wider society, it is logical to assume that all areas of law and policy that are in some way related to the social and economic life of an individual should be appropriated in order to give it expression"²¹⁹. This would not, therefore, only affect employment law, but all areas of law. Whilst it is certainly arguable that an ethic of care could improve the situation of those with caring responsibilities, it is not, I would argue, necessary to undertake such a radical overhaul of the legal system just to allow the reconciliation of family and work responsibilities.

Commitment to the value of care of children

2.5.17 As set out in Chapter 1, childcare is a vital social function and it is on this basis that we should value the time that parents spend with their children for the purposes of caring for them. As Fredman has stated "[a]ny programme of reform must start with an acknowledgement of the pivotal role played by parenting in society. The traditional relegation of parenting and child-care to the 'private' sphere has been a pretext for

²¹⁸ Herring (n54), p49

²¹⁹ Busby (n51), p49

undervaluing and stigmatising what ought to be recognised as a key social function"²²⁰. The value of parenting (and not the privileging of the mother-child relationship) must underpin any rights for parents. This means providing rights for parents, not basing fathers' entitlements on the eligibility of mothers which, as set out in Chapter 3 in relation to APL and Chapter 4 in relation to SPL, is the position in relation to some of the current rights. MacKinnon has said that "Feminism seeks to empower women on our own terms. To value what women have always done as well as to allow us to do everything else. We seek not only to be valued as who we are, but to have access to the process of the definition of value itself"²²¹. The care of children has historically been done by women; it still needs to continue to be done by someone. As set out below, the answer to the difficulty faced by women in reconciling work and family is not to outsource childcare.

2.5.18 Busby argues that fully outsourcing care, for example, by employing a nanny during the day and a night nanny so that it becomes fully commoditised is not possible due to the "...inalienability of certain aspects..." of the care relationship and the "...intrinsically intimate nature of the exchange that takes place between a carer and a recipient of care...[which] is crucial to the well-being of both parties"²²². I agree; I would argue that there is value in the time that a parent, who cares for a child on an emotional level, undertaking some of the physical tasks of caring for that child and being able to develop their bond with that child. To this end, it is important to value the time that parents spend with their children. As Herring has advocated this means that "..., the responsibility and care for children need to be both valued and accommodated within the public as much as the public sphere"²²³. A duty for employers to accommodate parental responsibilities would demonstrate the State's commitment to the value of caring, which could, as set out in Chapter 1, influence the views and behaviours of employers and society as a whole.

²²⁰ Fredman (n79), p206

²²¹ MacKinnon (n49), p22

²²² Busby (n51), p7

²²³ Herring (n54), p37

Protection for pregnancy

2.5.19 As well as valuing caring, we also need to value pregnancy and provide it with appropriate protection. But what should the limits of that protection be? Above, I have argued that pregnancy and childcare should be dealt with separately and there should be a short period of maternity leave, followed by a longer period of leave, available to either parent, for the purpose of caring for a new child.

2.5.20 In terms of the length of period of time that should be reserved exclusively for the mother, there appears to be little published research regarding the period of time that it will take for a woman to recover from childbirth, and clearly the amount of time that is actually needed will depend on the individual woman's circumstances. There is some evidence to suggest that physical recovery from childbirth will, for most women, take no more than six weeks²²⁴ (including where the mother has had a caesarean section²²⁵). Given the unpredictability of the date on which a baby will arrive (only 4% of babies are actually born on their due dates²²⁶), if a pregnant woman stops working on her due date, then there is a fair chance that her baby will not be born immediately. NHS National Institute for Clinical Excellence ("NICE") guidelines²²⁷ suggest that pregnant women should be offered induction of labour between 41 and 42 weeks and that, if unsuccessful, a caesarean section should be offered. As such, the majority²²⁸ of pregnant women in GB will have given birth within 2 weeks of their due dates.

2.5.21 On this basis, I would argue that the appropriate period for maternity leave would be eight weeks (being the six weeks needed to recover and a further two weeks to take account of the unpredictability of the date of childbirth) or such longer period as a physician determines is required to enable the mother to physically recover from childbirth.

²²⁴ Dowd (n96), 703 suggests that for the vast majority of women, the amount of time that it will take to recover from childbirth will last for no more than six weeks. This view is based on answers given by doctors, actuaries and insurers giving evidence during congressional hearings on the US Pregnancy Discrimination Act.

²²⁵ <http://www.nhs.uk/Conditions/Caesarean-section/Pages/Recovery.aspx>

²²⁶ Data from the Perinatal Institute, reported by the BBC (Keith Moore "How accurate are 'due dates'?", 3 February 2015 (<http://www.bbc.co.uk/news/magazine-31046144>

²²⁷ "Induction of labour (NICE clinical guideline 70)", July 2008

²²⁸ Whilst the NICE guidelines recommend that labour is induced by 42 weeks, they are clear that whether there is any medical intervention is a matter for the mother. As such, there may be some women who elect, having been informed of the risks associated with pregnancies over 42 weeks (which include an increased chance of stillbirth) not to permit medical intervention.

2.5.22 The EHRC 2008 report titled “Working Better”²²⁹ recommends a change to the current maternity leave entitlement along the lines advocated above. However, this report proposes a period of 6 months’ maternity leave with a further period of 12 months’ parental leave, 4 months of which are reserved exclusively for the mother and 4 months of which are reserved exclusively for the father. This still results in mothers being entitled to more leave than fathers – whilst mothers would be entitled to a minimum of 10 months’ leave (6 months’ maternity and the 4 months’ of parental leave that are reserved exclusively for them), fathers would be entitled to a minimum of 4 months (the 4 months of parental leave reserved exclusively for them) and a maximum of 8 months (4 months of parental leave that is reserved exclusively for them and the 4 months that can be used by either parent). The report does not explain why mothers should be entitled to a greater period of leave, but instead states that the policy acknowledges the existing leave policy as the starting point for any change, which seems to be the reason for retaining maternity leave. This would not assist with moving away from the privileging of the mother-child relationship to moving to a model where we value the contribution of both parents. As such, it does not seem to be an appropriate model to adopt.

2.5.23 Having dealt with time off for pregnancy above, below I deal with the issue of reproductive hazards; in short, I argue that these should be considered as part of risk assessment and that they should be treated no differently to any other type of hazard to workers given that, despite suggestions to the contrary, they affect both male and female workers.

Hazardous workplaces

2.5.24 There are some workplaces where workers are exposed to biological, chemical and other hazards that could cause damage to a foetus. Once a woman is aware that she is pregnant, steps can be taken to minimise her risks of exposure to such hazards. Some would argue that the problem with this approach is that a woman is unlikely to know that she is pregnant immediately after conception. As such, from the point of conception until the time that a woman does know that she is pregnant, she may already have been

²²⁹ EHRC (n181)

exposed to hazards that could harm the foetus. However, this overlooks the fact that even prior to conception, a person may have been exposed to hazards that can damage human germ cells (ie sperm or ova) resulting in damage to any foetus that develops from those germ cells. Below I argue that there is no need for a sex-specific approach to reproductive hazards as the issue of damage to germ cells affects both men and women. I should note before proceeding that there is no evidence of reproductive hazards currently being an issue in GB, however, since it does affect the way that we should deal with pregnancy (and the period pre-pregnancy), it is appropriate to deal with the issue here.

2.5.25 Lesley Wiseman has suggested that reproductive health protection policies of employers that apply only to women are used to keep women out of the workforce²³⁰. The World Health Organisation (“WHO”) acknowledges this on its website, stating that “...where such legislation ignores potential reproductive hazards to male workers it is not only scientifically unsound but fails to protect men while depriving women of an income”²³¹. The latter is a very good point. By focussing on female reproductive harm and excluding women from the workplace on this basis, employers deny women the ability to support themselves and their children financially. What employers also fail to realise is that if they dismiss a pregnant worker, in order to ensure the wellbeing of her foetus, the dismissal may itself affect the wellbeing of foetus. This is because, if the woman loses her job, this may impact on the economic situation of her family; if she is the only person working, then the family will have no income. This could result in her not being able to afford the right kinds of food that are necessary during pregnancy, thereby harming the foetus’ development. It could also mean that the child, once born, is brought up in poverty, which is likely to have an impact on the child’s health and wellbeing²³², as well as having a cost for society in terms of money that the UK Government spends in trying to counter the effects of child poverty, and in the economic costs of children failing

²³⁰ Lesley Wiseman, “Place for Maternity in the Global Workplace: International Case Studies and Recommendations for International Labor Policy”, 28 *Ohio N.U.L. Rev* 195 (2001-2002), 225

²³¹ http://www.who.int/occupational_health/publications/womandoh/en/index.html

²³² See for example, the information on the effects of child poverty on the Campaign to end Child Poverty’s website (<http://www.endchildpoverty.org.uk/why-end-child-poverty/the-effects>).

to reach their potential²³³. For this reason, the Marmot Review²³⁴ recommends that parents be provided with paid leave in the first year of life with a minimum income for healthy living. It is also interesting to note that, in several cases, where a male reproductive hazard has been identified, rather than men being banned from that workplace, the hazardous substance was banned²³⁵.

2.5.26 Research suggests that male reproductive damage may cause miscarriage, low birth weight, congenital abnormalities, cancer, neurological problems and other childhood health problems²³⁶. The WHO paper "Women and Occupational Health" cites the example of high temperatures which can be hazardous to the male reproductive system (but which do not appear to have any impact on the female system). However historically there had been little research into this. It is only very recently that this has changed, and as Hoeskma notes is unsettling, "...particularly because even the few studies performed on both men and women prove that sometimes the risk to the reproductive system is greater for men than for women"²³⁷.

2.5.27 The focus solely on female reproductive damage can be seen as yet another example of the privileging of the mother-child (or in this case, potential child) relationship. Because motherhood is seen as a natural state for women (so long as it is outside the public sphere) anything that potentially might impact that natural state must be avoided. Fatherhood is not seen in the same way; it is never assumed that all men will be (or want to be) fathers. Further, their role in relation to children had, historically, been one of being an economic provider, thus anything that might detract from this function (for example, a father losing his job, and therefore ability to provide) must be avoided.

2.5.28 In order to ensure a safe working environment for all employees, irrespective of sex, the employer should attempt to eradicate the hazard or limit exposure to a level where it cannot cause damage. There may, however, be circumstances where it is not

²³³ See for example, Donald Hirsch, "Estimating the Costs of Child Poverty", Joseph Rowntree Foundation, 23 October 2008, which estimates the costs to be £25 billion per year.

²³⁴ Marmot (n130)

²³⁵ Elaine Draper ("Reproductive Hazards and Fetal Exclusion Policies after Johnson Controls", 12 *Stan L & Pol'y Rev.* 117 (2001)) noted that DBCP, Kepone and other male reproductive hazards have been banned.

²³⁶ Cynthia Daniels, "Between Fathers and Fetuses: The Social Construction of Male Reproduction and the Politics of Fetal Harm", *Signs*, Vol.22, No.3 (Spring 1997) pp579-616

²³⁷ Nicola Hoeskma "Regulating risk: reproductive toxins in the workplace in the post-Johnson Controls era", 14 *S Cal Rev L & Women's Stud*, Spring 2005, 289

possible to eliminate a hazard which affects only one sex. In these circumstances, which will be limited, it should be the employer's responsibility to scientifically prove that the hazard affects only the one sex and that it is not practicable to eradicate the hazard. Only then would it be appropriate for special measures to be taken against one sex and not the other. The measures taken should be the same as those that would be taken for non-sex specific risks.

2.5.29 Protection once Pregnant

2.5.30 The majority of women will not require any special treatment in the workplace other than time off to give birth and recover, however, there will be some workplaces where there are potential hazards for a pregnant woman and her unborn child. I consider here, from a theoretical perspective, how such issues are best addressed. Workers, whether pregnant or not, may face physical hazards in the workplace. However, physical hazards can cause a risk not just for the pregnant worker but also her unborn child. By way of example, a fall on stairs can cause placental abruption²³⁸, which is a potentially serious condition for both mother and unborn child. Equally though, any worker, whether pregnant or not, could fall on stairs, hit his/her head and end up in a life-threatening condition. It would be unrealistic to expect no employer to have a set of stairs in their premises. It is impossible to eliminate every risk to every worker. Nevertheless, risks need to be identified and assessed (in terms of frequency and severity of consequence), usually by way of a risk assessment.

2.5.31 Whilst there are some risks which may affect pregnant women differently to others, for example stress or working excessive hours, this does not necessarily mean that the worker should have an additional risk assessment. There is no reason that pregnancy-related risks should not be taken account of during routine risk assessments, irrespective of whether, at the relevant time, they have an employee who is pregnant. Workers do not have to inform their employers immediately on becoming pregnant so there is a significant risk that, even where an employer has not been informed of a worker being

²³⁸ This condition can result in the foetus being deprived of oxygen and nutrients and can be life-threatening for the mother (http://www.marchofdimes.com/pnhec/188_1135.asp)

pregnant, there will in fact be some pregnant workers within the employer's organisation. Incorporating consideration of pregnant workers into routine risk assessments would also have the advantage of incorporating pregnancy within the routine thinking of employers, thereby eliminating the invisibility of pregnancy, whereby the norm is a non-pregnant individual.

2.6 Are the current rights sufficient?

2.6.1 As highlighted throughout this chapter, there are various problems in the theoretical ideals underlying the current workplace parental rights. I will demonstrate in Chapters 3 to 6 that the current rights designed to enable parents to combine work and family responsibilities are not fit for purpose and do not achieve this aim and that this is because of the ideals underlying these rights and the lack of a coherent approach to the difficulties of reconciling work and family responsibilities. Having done so, in Chapter 7, I will argue that an alternative approach needs to be adopted to these issues, one which will allow us to use the theoretical framework advocated in this chapter.

CHAPTER 3 : GENDER SPECIFIC PARENTAL RIGHTS

3.1 Introduction

3.1.1 In this chapter and the two that follow, I will be considering the existing legislation which is supposed to enable parents to combine their work and family responsibilities, and what changes would be needed to these rights to make them more effective. I will consider not only those rights that apply solely to parents, such as parental leave, but also rights which may facilitate work-life balance, such as those provided by the Working Time Regulations 1998. As the legislation in this area is extensive, I have divided the various rights into two categories:

3.1.1.1 Gender specific rights. These are rights which enable one specified parent to combine work and family, for example, maternity leave;

3.1.1.2 Non-gender specific rights. These are rights which enable either or both parents to combine work and family, for example, parental leave.

I consider separately in Chapter 6 the issue of how these rights are enforced (including the adequacy of any remedies that can be awarded).

3.1.2 However, before embarking on the analysis of the various rights, it is first necessary to consider what we mean when we refer to “employees” and to “workers”. This is because some of the rights considered in this and the following chapter apply to employees, whereas others apply to workers. I will also consider the rights in respect of unfair dismissal and detriment as these apply to many of the rights that I will be considering in this and the next chapter.

Employment status

3.1.3 In the workplace, an individual can be an employee, a worker or a self-employed contractor. Some of the workplace parental rights, though, apply only to employees: maternity, paternity and parental leave, Emergency Dependant’s Leave (“EDL”) and the

right to request flexible working. As such, many workers will be unprotected as regards those rights.

3.1.4 As employers have begun to look at alternative structures for engaging individuals and there has been an increase in the number of self-employed workers in the UK, the need for rights which cover not only employees but also workers has become more important. Employers may utilise self-employed workers/temps in an effort to avoid such individuals acquiring employment rights, such as unfair dismissal. There are no publicly available statistics on how many individuals in the UK (or GB) are engaged as workers, rather than employees²³⁹ or how many of those have family responsibilities. As such, it is difficult to assess the impact that providing rights only to employees has on parents trying to combine work and family responsibilities. However, it would seem likely that, if a right applies only to employees, there will be some parents who are workers and thus cannot utilise this right.

Unfair dismissal and detriment protection

3.1.5 If an employee is dismissed as a result of exercising one of the parental rights or attempting to do so, this will have a significant impact on the employee's ability to work (and therefore to combine work and family responsibilities). Protection against dismissal is therefore a key mechanism for ensuring that parents are able to combine their work and family responsibilities.

3.1.6 Employees enjoy protection against being dismissed if the reason for the dismissal is that they have exercised or are seeking to exercise one of the parental rights (or have tried to enforce a right)²⁴⁰, if it is connected with pregnancy,²⁴¹ or if they fail to

²³⁹ There is data on the numbers of self-employed individuals, some of which will be workers and some will be contractors (for example, the Labour Force Survey). This data shows an increase of 30.3% in the numbers of self-employed individuals and an increase of 21% in the numbers of temporary workers (excluding those on fixed term contracts) between 1997 and 2015. Annex 6 sets out the underlying calculations.

²⁴⁰ This is if the employee: (i) is taking or seeking to take parental leave or time off under section 57A of the ERA; (ii) she is taking or seeking to take OML or AML; (iii) is taking or seeking to take paternity leave; (iv) has made (or proposed to make) an application to request flexible working under section 80F of the ERA; (v) has exercised (or proposed to exercise) a right conferred on him/her under the right to request flexible working; (vi) has brought proceedings against the employer under section 80H of the ERA or has alleged the existence of any circumstance which would constitute a ground for bringing such proceedings

²⁴¹ This is if the employee is pregnant or has given birth to a child.

return from maternity leave in circumstances where they did not know that their maternity leave had ended²⁴². In these circumstances there is no qualifying period of employment (by contrast, where the employee is unfairly dismissed in other circumstances, there is a two year qualifying period).

3.1.7 Protection against unfair dismissal applies only to employees and not to workers. However, workers enjoy equivalent protection because of the detriment provisions in the rights described above in 3.1.6. These provide that it is unlawful to terminate a worker's contract because of that worker has exercised or is seeking to exercise one of the parental rights (or have tried to enforce a right) or if the termination is connected with pregnancy²⁴³.

CRITIQUE

3.1.8 The unfair dismissal and detriment provisions are useful but they do not stop an employer from dismissing an employee or terminating a worker's contract. Instead they provide a remedy where this occurs. The most significant problems with the unfair dismissal and detriment rights are the fact that in most cases the remedy awarded is financial compensation, which, as discussed in Chapter 6, does not necessarily assist a parent or pregnant worker in finding new employment.

GENDER SPECIFIC RIGHTS

3.2 Protection during pregnancy

3.2.1 As discussed in Chapter 1, protection for pregnant workers is important to ensure that women are not effectively forced out of the workplace simply as a result of pregnancy. An EOC report in 2005 found that 30,000 women per year were being forced out of their jobs as a result of becoming pregnant and that pregnancy discrimination was endemic in the workplace, with half of all pregnant workers facing some form of

²⁴² Regulation 19 of the MPLR

²⁴³ s47C ERA

disadvantage connected with their pregnancies²⁴⁴. Whilst, as at 1 March 2015, there are no more recent figures on the extent of pregnancy discrimination, there is no reason to think that this situation has changed²⁴⁵.

Outline of existing rights

3.2.2 At a European level, protection during pregnancy is conferred on workers by the Pregnant Workers Directive (“**PWD**”). The PWD contains a range of measures relating to the health and safety not only of pregnant workers, but also of those workers who have recently given birth or who are breastfeeding. In GB, the PWD has been implemented through various different pieces of legislation. Those aspects relating to health and safety have been implemented by the Management of Health and Safety at Work Regulations 1999 (“**MHSWR**”). As set out in Chapter 1, it is important that appropriate protection is given to pregnant workers given that pregnancy is a social good and that the absence of appropriate levels of protection can disadvantage women in the workplace, contributing to issues such as the gender pay gap. Without effective protection, pregnant women and new mothers will be driven out of the workplace rendering rights enabling parents to combine work and family responsibilities of little practical use.

Health and Safety

3.2.3 Before embarking on this issue though, it is important to acknowledge that the majority of women will not require any special treatment in the workplace in respect of health and safety concerns. However, there may be some pregnant workers who need additional protection because their roles entail certain tasks or working conditions that could jeopardise their pregnancies, for example, by disrupting placental attachment²⁴⁶. I

²⁴⁴ EOC “*Greater Expectations: Final Report – EOC’s investigation into pregnancy discrimination*”, EOC, June 2005. It is notable that this is not a phenomenon that is restricted to the UK and that there is evidence that in other countries, employers take extreme measures to ensure that pregnant workers leave the workplace. For example, in Mexico there is evidence of some employers forcing pregnant women to work with toxic chemicals or being transferred to jobs that are more strenuous in order to force them to resign. (Wiseman (n230))

²⁴⁵ Since 1 March 2015, the EHRC has published its findings on the prevalence and nature of pregnancy discrimination and disadvantage in the workplace (Lorna Adams, Mark Winterbotham, Katie Oldfield, Jenny McLeish, Alice Large, Alasdair Stuart, Liz Murphy, Helen Rossiter, Sam Selner (IFF Research Limited), “*Pregnancy and Maternity-Related Discrimination and Disadvantage: Summary of key findings*”, HM Government, EHRC, 2016). The findings of this investigation were that 11% of mothers reported that they felt forced to leave their jobs. This was based on a sample of 3,254 mothers and, if scaled up to the general population, this would equate to 54,000 mothers each year being forced out of their jobs.

²⁴⁶ The placenta is the connection between the mother and foetus which provides the foetus with oxygen and nutrients allowing it to grow; any disruption of these could have potentially catastrophic consequences.

do not propose here to examine these in detail, but rather to consider how they should be dealt with in general.

3.2.4 Workers, whether pregnant or not, may face physical hazards in the workplace. However, physical hazards can cause a risk not just for the pregnant worker but also her unborn child. By way of example, a fall on stairs can cause placental abruption²⁴⁷, which is a potentially serious condition for both mother and unborn child. Equally though, any worker, whether pregnant or not, could fall on stairs, hit his/her head and end up in a life-threatening condition. It would be unrealistic to expect no employer to have a set of stairs in their premises. It is impossible to eliminate every risk to every worker. Nevertheless, risks need to be identified and assessed (in terms of frequency and severity of consequence), usually by way of a risk assessment.

3.2.5 The PWD requires that employers assess the nature, degree and duration of the exposure of any risks to the pregnant worker. The UK legislation is worded differently to the PWD and provides that "[w]here (a) the persons working in an undertaking include women of child-bearing age²⁴⁸; and (b) the work is of a kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby, from any processes or working conditions, or physical, biological or chemical agents, ..., the assessment required by regulation 3(1) [which is the general requirement to carry out a risk assessment for all workers] shall also include an assessment of such risk." This seems to suggest that, rather than an employer considering whether there are any particular risks for a pregnant worker at the time she informs the employer of her pregnancy, the employer must consider this issue as part of its general risk assessment.

3.2.6 In *Madarassy v Nomura International plc*²⁴⁹ it was held that an employer need only undertake a risk assessment at the time the worker's pregnancy was announced where

²⁴⁷ This condition can result in the foetus being deprived of oxygen and nutrients and can be life-threatening for the mother (http://www.marchofdimes.com/pnhec/188_1135.asp)

²⁴⁸ Child-bearing age is not a defined term and, given the fact that it is becoming possible for a woman to have a child in her sixties, now seems to cover any woman of working age

²⁴⁹ [2007] EWCA Civ 33

the work is of a kind which could involve risk, by reason of the woman's condition, to the health and safety of a new or expectant mother, or to that of her baby.

3.2.7 *Madarassy* was followed by an Employment Appeal Tribunal (“EAT”) decision in *O’Neill v Buckinghamshire County Council*²⁵⁰. The Appellant in this case was a teacher who was seeking to argue that her job was stressful and once her employer was informed of her pregnancy, the stressful nature of her job therefore triggered the obligation to conduct a risk assessment. However, the Appellant’s submissions on this point related only to the stressful nature of the job in general terms, and the tribunal found (and the EAT agreed) that there was insufficient evidence for it to conclude that the kind of work carried out by the Appellant involved a risk of harm or danger to her as a pregnant worker as defined by the PWD and the MHSWR. As such, there was no obligation to carry out a risk assessment at the time of the pregnancy being announced. In both *Madarassy* and *O’Neill*, there was no evidence that the employer had specifically considered pregnant workers when carrying out any general risk assessments.

3.2.8 If an employer has conducted an appropriate risk assessment and a risk to the pregnant worker has been identified there is a requirement (under Regulation 16 of the MHSWR) the employer is required to make adjustments to the working conditions and/or working hours of the employee so as to avoid exposure to the identified risk²⁵¹. Similar obligations exist in relation to agency workers²⁵² but not to other workers. However, an employer (or a hirer in the case of an agency worker) is not obliged to take any steps to alter a pregnant woman’s role, to offer her alternative work or to suspend

²⁵⁰ [2010] I.R.L.R. 384

²⁵¹ HSE guidance on the risks or hazards that could be harmful to new and expectant mothers identifies, amongst other things, excessive hours, unusually stressful work, and travelling - <http://www.hse.gov.uk/mothers/faqs.htm>, and *New and Expectant Mothers at Work - A guide for employers* HSG122 ISBN 0 7176 2583 4

²⁵² Under the Agency Workers Regulations 2010, the hirer of an agency worker is obliged to conduct a risk assessment and to make adjustments to the workplace to remove the risks. Where this is not possible, the agency that supplied the worker will have to try to find the worker suitable alternative work with another hirer or the agency will be required to pay the agency worker at the same rate for the duration (or, where the duration is not certain, the likely duration) of the terminated assignment

her, until it receives, not only notification, but written notification from the employee that she is pregnant²⁵³.

3.2.9 Whilst there are some risks which may affect pregnant women differently to others, for example stress or working excessive hours, this does not necessarily mean that the worker should have an additional risk assessment. There is no reason that pregnancy-related risks should not be taken account of during routine risk assessments, irrespective of whether, at the relevant time, they have an employee who is pregnant. Workers do not have to inform their employers immediately on becoming pregnant so there is a significant risk that, even where an employer has not been informed of a worker being pregnant, there will in fact be some pregnant workers within the employer's organisation. Incorporating consideration of pregnant workers into routine risk assessments would also have the advantage of incorporating pregnancy within the routine thinking of employers, thereby eliminating the invisibility of pregnancy, whereby the norm is a non-pregnant individual. As argued in Chapter 2, changing the norm is essential to securing effective rights to enable parents to reconcile work and family responsibilities.

3.2.10 The problem with the current legislation is not the theoretical approach but how it has been executed in practice. In particular, where an employer is challenged about risk assessments there is little evidence that employers have to demonstrate that they have specifically considered pregnancy in the context of any risk assessments that they have conducted as shown by both *Madarassy* and *O'Neill*²⁵⁴.

3.2.11 The problem with this approach is that it suggests that the effects of pregnancy are not considered as part of the routine risk assessment as, if they had been, there would be no need to reconsider simply because a worker announced that she was pregnant, thereby reinforcing the norm of the non-pregnant worker. It is also of note that there was no evidence in the case to suggest that any general risk assessment that the employer had

²⁵³ Regulation 18

²⁵⁴ [2010] I.R.L.R. 384

conducted of the health and safety risks to all staff had considered whether pregnant women would be affected differently to others.

3.2.12 One particular issue that seems to have been ignored in both the *Madarassy* and *O'Neill* cases is the effect of long working hours and stress on pregnant workers. The number of hours that a pregnant worker works is, according to a study conducted by the Amsterdam Born Children and their Development research group²⁵⁵, likely to affect the health of the worker's unborn child. This study suggests that working in stressful jobs in excess of 32 hours a week can affect the health of a woman's unborn child. "Normal" full time working hours in GB tend to be at least 35 hours per week, which suggests that employers are required by the PWD (which provides that employers must assess any risks to the safety or health of the worker and any possible effect on her pregnancy) to conduct a risk assessment for any woman in a job where "normal" full time hours are worked (as opposed to simply where there is a contractual requirement to work 32 hours or more per week²⁵⁶). This is not a point which appears to have been argued in *Madarassy* or *O'Neill*; it may be that if this research is presented in future cases, the outcome will be quite different. However, research may not always be widely publicised outside academic circles and so those bringing this type of case may not be aware of it. Where a claimant is (and, as discussed in Chapter 6, the majority of claimants will be) unrepresented, there is a greater chance that the claimant may not be aware, and so may not present to the tribunal/court, the relevant evidence. Arguably this type of problem arises because these rights are enforced for the benefit of individuals, rather than society as a whole; this issue is discussed further in Chapter 6 and because, as argued in Chapter 1, the value to society of someone having a child is not properly recognised. The failure to consider the effect of working hours may also be as a result of the way in which the norm is constructed, as discussed in Chapter 2. Society views full-time work as the norm;

²⁵⁵ Tanja Vrikotte, Manon van Eijsden, Marcel van der Wal, Gouke Bonsel "First trimester working conditions and birth weight: a prospective cohort study", *Am J Public Health* 2009;99:1409-16

²⁵⁶ The reason for this distinction is that many employees may have contracts which provide for a particular number of hours, but the employee may in practice work in excess of their contractual hours (e.g. through paid or unpaid overtime).

as such we do not question why someone is required to work 35 hours per week or whether there are any negative effects of this.

3.2.13 Effectively employers can disregard the impact of the private sphere, the employee's pregnancy, on the work sphere until the employee complies with the requirement for written notification. This is only possible because of the concept of the separate spheres, as critiqued in Chapter 2.

3.2.14 As noted above, the obligation to find alternative work only applies to employees, but an employer must conduct a risk assessment for all workers. As such, an employer could be aware of a risk to a pregnant worker and have no obligation under the Employment Rights Act 1996 ("ERA") to find alternative work because she is not an employee. Without an obligation to find alternative work, there is a real danger that employers will terminate the contract of the worker; in these circumstances the worker would not have a claim under the ERA or MHSWR, although she might have a sex discrimination claim, considered in Chapter 5). This illustrates one of the significant problems with the current legislation: the piecemeal approach. The sheer volume of different pieces of legislation makes it difficult for both employers and workers to understand their rights and obligations. One might imagine that if you wanted to check, as an employer, what your obligations were in relation to a pregnant worker's health and safety, you could simply go to the relevant health and safety legislation, which does not prevent the termination of a worker's contract in circumstances where it is unsafe to continue to engage her in that role, however, doing so could result in the termination amounting to unlawful discrimination.

3.2.15 By limiting GB legislation to employees, one could argue that the UK Government has not properly implemented the EU legislation, which applies to workers, thereby leaving it open to challenge. The fact that an individual is a worker, rather than an employee, should not affect their ability to continue to work in the lead-up to the birth of their child; this is a clear failing in the legislation.

3.2.16 In the instances where moving the employee is not possible (which are likely to be infrequent), the employee is to be granted leave. Under the ERA²⁵⁷ an employee who is suspended from work for this reason is entitled to be paid during her period of suspension. This is one area where GB legislation seems to be more generous than the rights under the PWD.

3.2.17 Under the ERA, for alternative work to be considered to be suitable, the terms and conditions on which the role is offered must not be “substantially less favourable” and the work must be of a kind which is suitable and appropriate for the employee to do in the circumstances. In *British Airways Ltd v Moore*²⁵⁸ the EAT ruled that the fact that the remuneration for a role offered to a pregnant employee did not include an allowance of around £5,500 which the pregnant employee had previously received, meant that the terms and conditions on which the alternative role was offered were substantially less favourable (and therefore was not a suitable alternative).

3.2.18 In two CJEU cases considering the payments given whilst an employee was suspended because of pregnancy, *Gassmayr v Bundesminister für Wissenschaft und Forschung*²⁵⁹ and *Parviainen v Finnair Oy*²⁶⁰, the CJEU held that allowance payments were not required to be made. This was on the basis that the allowances in question were to compensate employees for disadvantageous aspects of their jobs which, as a result of suspension on maternity grounds, a pregnant worker would not be disadvantaged by.

Time off

3.2.19 As well as time off to have the baby, which is discussed below at 3.3, a pregnant worker may need time off in order to attend appointments relating to her pregnancy, for example, ante-natal appointments. Currently, as set out below, whilst pregnant workers have the right to time off for all those appointments, the father of the unborn child does not.

²⁵⁷ Section 68 ERA

²⁵⁸ [2000] IRLR 296

²⁵⁹ Case C194/08

²⁶⁰ Case C471/08

3.2.20 With effect from 1 October 2014 fathers are able to take time off to attend a limited number of what the Government terms "significant" antenatal appointments. The Government estimates that for a first pregnancy the mother will, in a routine pregnancy, need to attend 12 ante-natal appointments (10 routine appointments and two scans), however, fathers will only be entitled to attend two of these.

3.2.21 Both parents have an interest in the outcome of these appointments as one of the purposes of them is to monitor the health and development of the foetus. However, there is one fundamental difference between the mother and father²⁶¹: the mother has to attend the appointments in order for the foetus to be monitored, whereas the father does not. This does not mean that the father's attendance is not important; there is evidence²⁶² that a father's attendance at ante-natal appointments helps early bonding and increases his commitment to the pregnancy. There is also likely to be minimal inconvenience to the employer as non-routine ante-natal appointments are likely to be relatively short and infrequent. At any non-routine appointments, there is likely to be additional information shared with the parents about the development/health of the foetus. Both parents have an equal interest in such information and, as such, both should be entitled to receive this directly from the relevant medical professionals. This is another example of the privileging of the mother-child relationship described in Chapter 2. Fathers have the same interest in the foetus' development as mothers; if we are to expect fathers to participate equally in respect of rearing a child, their equal involvement needs to start *in utero*.

3.2.22 Where routine ante-natal appointments are concerned, the argument as to whether fathers should be entitled to attend is more finely balanced. There seems to be less need for fathers to attend a routine appointment where no significant medical information about the foetus is provided. There is clearly a difference here between the

²⁶¹ It should be noted that not all parent sets will be female-male, but to ensure that the arguments below are as straightforward as possible to comprehend I refer to father, meaning either the father or the mother's partner

²⁶² Elaine Draper, 'It was a real good show': the ultrasound scan, fathers and the power of visual knowledge, *Sociology of Health and Illness*, 24(6) pp. 771-795 (2002). and Jacinta Bronte-Tinkew et al, 'Resident fathers' pregnancy intentions, prenatal behaviours and links to involvement with infants', *Journal of Marriage and Family*, 69(4) pp. 977-990 (2007).

father and the pregnant women: the pregnant woman has to attend the appointment as she is carrying the foetus. The father's attendance is not necessary in the same way. Given the need to balance the interests of workers and employers (as well as those who workers who do not have children), I would argue that fathers should be entitled only to time off for all non-routine appointments.

3.3 MATERNITY LEAVE

Outline of existing rights

3.3.1 The current rights afforded to women on maternity leave are summarised below:

3.3.1.1 All female employees are entitled to a total of 52 weeks' leave: 26 weeks ordinary maternity leave ("**OML**"), and 26 weeks additional maternity leave ("**AML**").

3.3.1.2 There is a compulsory maternity leave ("**CML**") period of two weeks from the day on which an employee gives birth. During this period an employee is not permitted, and an employer is not allowed to permit the employee, to work²⁶³.

3.3.1.3 Women on maternity leave are entitled to benefit from the same terms and conditions of employment that they would have enjoyed had they not been absent on maternity leave, except for those which relate to remuneration²⁶⁴.

3.3.1.4 Women are entitled, if they meet certain conditions²⁶⁵, to statutory maternity pay ("**SMP**") for 39 weeks of their maternity leave, subject to

²⁶³ This is four weeks where the employee works in a factory (section 205 Public Health Act 1936).

²⁶⁴ This is the position following the amendments to the SDA by the Sex Discrimination (Amendment of Legislation) Regulations 2008. These amendments were required after the case of *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] 2 CMLR 49 in which the High Court ruled that in essence the distinctions made between OML and AML (in short, whilst it would have constituted sex discrimination to deprive a woman of any term and condition of employment whilst she was on OML, during AML depriving a woman of only certain specified non-pay benefits of her terms and conditions would constitute sex discrimination – i.e. an employer could deprive the woman of some other term and this would not be unlawful discrimination) incompatible with the SDA and therefore unlawful.

²⁶⁵ The relevant conditions are set out in section 164 of the Social Security Contributions and Benefits Act 1992.

meeting the conditions. For the first six weeks the SMP is paid at a rate of 90% of a woman's weekly wage and for the remaining 33 weeks, it then falls to £138.18 per week.

3.3.1.5 During the maternity leave period, the woman can carry out up to 10 days' work in the form of Keeping in Touch ("**KIT**" days). An employer is only obliged to pay these at the usual SMP rate.

3.3.1.6 If a woman returns to work at the end of the period of OML she is entitled to return to the same job on the same terms and conditions (or terms and conditions no less favourable than those to which she was entitled prior to her maternity leave)²⁶⁶.

3.3.1.7 If a woman returns to work having taken any AML, she is entitled to return to the job in which she was employed before her absence unless it is not reasonably practicable for her employer to let her do so; in which case she is entitled to return to another job which is suitable and appropriate for her in the circumstances.

3.3.1.8 An employee is protected against being dismissed because of her pregnancy or because of taking maternity leave.

CRITIQUE

3.3.2 Before embarking on a critique of the current maternity provisions, it is important to flag here that there is a fundamental issue that needs to be considered when evaluating the maternity leave provisions, which is whether maternity leave as a concept (i.e. the idea of providing leave only to the mother) is one that is helpful to enabling parents to combine their work and family responsibilities. This issue is highlighted at various points during the critique below of the effectiveness of the current maternity leave provisions (i.e.

²⁶⁶ Regulation 18 MPLR

whether these enable women to take 12 months' leave) with the more substantive consideration of it being addressed at 3.3.11.

CML

3.3.3 CML effectively forces an employer to ensure that a woman takes at least two weeks' maternity leave. This approach is potentially a double-edged sword. On the one hand it is helpful as it prevents women from feeling unable to take a period of leave (for example, some women may fear that, despite the legal position permitting them to take leave and the employer having an obligation to allow them to return to the same role, if they are out of the workplace for any period of time, they will be seen as lacking commitment to their role or even that they will be replaced). On the other hand, in no other circumstances are criminal sanctions threatened in the event that an employer allows an employee to work; thus if a woman genuinely wishes to work (rather than feeling forced to do so), she is unable to do so.

3.3.4 Given that the male norm is an employee who works continuously and deviations from this are often seen as demonstrating a lack of commitment to an employee's role, properly facilitating an absence from the workplace to allow recovery from childbirth seems to be an important and desirable aim. Because of the criminal sanctions associated with CML, a woman who does not attend work (and who does not respond to emails/calls) can be seen as simply complying with the rules around CML, rather than making a choice not to be involved in work responsibilities. The potential downside of the CML provisions are outweighed by the benefits whilst the period of CML remains short. However, any increase in this period would be potentially damaging as it would reinforce the idea that primary responsibility for a child should rest with the mother. Whilst the period remains short (ie two weeks), it seems clear that the rationale for the provision is to allow a woman to recover from childbirth, rather than necessarily simply to allow her to care for her child.

Low level of SMP

3.3.5 Women are not entitled to full pay during any period of maternity leave, even the two weeks' of CML during which the woman is prohibited from working.

3.3.6 The rate at which SMP is paid for the majority of the maternity leave period is relatively low. For 33 weeks of the leave²⁶⁷, the rate is £138.18 per week²⁶⁸. Providing women with such a low level of pay for the majority of their maternity leave "fails to provide a real choice for many women who do not have another source of income ... to support them during the period of unpaid leave"²⁶⁹. This is exacerbated by the fact that the first year of a child's life can be extremely costly for a parent. Research conducted for LV estimates the cost in 2015 to be £11,224²⁷⁰. So, at a time when a family's expenditure may increase significantly, if the woman opts to take maternity leave the family's income may drop significantly. Research conducted when the whole period of AML was unpaid showed that many women had to return to work after their period of OML due to economic reasons, rather than taking the additional period of leave to which they were entitled²⁷¹. This demonstrates the fact that whether leave is paid or unpaid has a real impact on the length of time that women take off as maternity leave.

3.3.7 Providing twelve months' maternity leave where most of the leave is paid at low levels does not allow women to take time away from the workplace to be with their new child. Instead it provides lip-service to the value of mothering and parenting. As Fredman has noted "[t]he central manifestation of the low priority given to maternity and parenthood within the market order is the low level of statutory maternity pay"²⁷². Only those with sufficient wealth will be able to afford to take leave paid at these levels as demonstrated by the fact that, according to research, just 13% of women on maternity leave take their full entitlement to leave (52 weeks). This figure falls to just 5% amongst

²⁶⁷ For the first 6 weeks the rate is calculated by reference to the employee's normal earnings and is 90% of this.

²⁶⁸ This is the rate that applies from 6 April 2014 to 4 April 2015. From 5 April 2015, the rate is £139.58

²⁶⁹ DTI Work and Families – Choice and Flexibility: a consultation document (February 2005), p16

²⁷⁰ "Cost of a Child: From cradle to college, 2015 report", LV, January 2015

(<http://lv.com/lifeassets/assets/documents/coac-report-final.pdf>)

²⁷¹ Maria Hudson, Stephen Lissenburgh and Melahat Sahin-Dikmen 'Maternity and Parental Rights in Britain 2002: Survey of Parents', PSI, 2004

²⁷² Fredman (n79), p199

very low earners and is highest (27%) amongst those whose partners have gross weekly earnings of £770 or more²⁷³, presumably because these households are more able, from an economic perspective, to survive on a single wage. The right to maternity leave, therefore, is a right which would only be effective if employees were sufficiently compensated to be able to afford to utilise the leave – only 45% of those who are eligible for maternity leave took 40 weeks or more (which is the period that is unpaid), with this falling to 36% of those who have the lowest earnings (less than £5 per hour). The failure to provide a higher level of maternity pay means that the right to maternity leave is not as effective as it could be. As discussed in Chapter 1, providing appropriate rights to enable women to have children, whilst also retaining their job, is crucial to equality and social justice. If maternity leave is not paid at an appropriate level, then although women may have the right to take time off, many will not be able to afford to do so. It also reaffirms pregnancy and the care of a child as an issue for the individual, rather than something of concern for all of society.

3.3.8 James has made some interesting observations in relation to the KIT day provisions. As set out above, the employer is only required to pay for these at the usual SMP rate, although the employer can agree to pay the employee's normal contractual rate if it so chooses. This means that "...a woman is financially penalised for work she undertakes for her employer during her leave period and law legitimises this devaluation of her performance..."²⁷⁴. This demonstrates the way in which a worker's value can change once she no longer conforms to the unencumbered worker norm, discussed in Chapter 2; her labour is suddenly less valuable simply by having a care responsibility.

Right to return – unfair distinction between OML and AML

3.3.9 The difference in treatment in relation to a woman's entitlement to continue (following her maternity leave) in the job in which she worked prior to her maternity

²⁷³ Jenny Chanfreau, Sally Gowland, Zoe Lancaster, Eloise Poole, Sarah Tipping and Mari Toomse "DWP Research Report No 777, Maternity and Paternity Rights Survey and Women Returners Survey 2009/2010", DWP, 2011

²⁷⁴ James (n10), p279

leave between those women that take AML and those that simply take the period of OML (which is set out above at 3.3.1.5 and 3.3.1.7) was identified by the EOC as being an area where the law fails to provide adequate protection against pregnancy discrimination²⁷⁵. Given that there has been no change in the law since the EOC's report in 2005, the issues identified by the EOC must remain²⁷⁶. The distinction between the two periods of leave is capable of discouraging women from exercising their full period of maternity leave. If a woman fears that her employer will view her maternity absence unfavourably (in particular because she will no longer comply with the norm in respect of being an unencumbered worker), she may feel forced to return after just six months to minimise the employer's ability to change her role. An absence of more than 26 weeks does not seem to be any more difficult to find cover for than a period of 26 weeks, given that the employer is provided with advance notice of maternity leave (since a woman must notify her employer of the date when she intends to start her maternity leave and is assumed to return at the end of her full entitlement to leave²⁷⁷) and a woman can only elect to return early if she provides sufficient notice of this to their employer. It is also noteworthy that, under earlier legislation, women were only required to provide four weeks' notice, rather than the current eight weeks'. The rationale for increasing this was to allow an employer "... to plan ahead and adapt the business to take account of these changing circumstances"²⁷⁸. The approach to the right to return reflects the fact that, as discussed in Chapter 2, the norm is a male unencumbered worker, who never needs to take a long period of leave. It also reflects the fact that caring for a child is not valued by society. If the norm had been developed around those with caregiving responsibilities, it is difficult to imagine that a worker would be discouraged from taking her full entitlement of leave.

²⁷⁵ EOC (n244)

²⁷⁶ As mentioned in FN 245, since 1 March 2015, the EHRC has published more recent figures on the extent of pregnancy discrimination and disadvantage. This shows no change in the situation (indeed, given that the figures suggest that 54,000 mothers may be forced out of their jobs each year, it is arguably worse than the position set out in the EOC report, which suggested a figure of 30,000 per year).

²⁷⁷ Either 26 weeks in the case of OML or an additional 26 in the case of those entitled to take AML

²⁷⁸ DTI *Work and Families Consultation: Government Response to Public Consultation*, October 2005

Right to return – too wide a definition of “job”

3.3.10 Although those that return to work during OML currently enjoy superior protection to those who return during AML, the legislation on the former is still not perfect and a woman returning from OML may not always be permitted to return to exactly the same role that she did prior to her leave. This is due to the wide definition of “job” adopted by the Maternity and Parental Leave, etc Regulations 1999 (“**MPLR**”) which provides that “in relation to an employee returning after additional maternity leave or parental leave, [job] means the nature of the work which she is employed to do in accordance with her contract and the capacity and place in which she is so employed”. There are few reported cases on this issue, the only appellate case being *Blundell v Governing Body of St Andrew’s Catholic Primary School*²⁷⁹. (*Kelly v Secretary of State for Justice*²⁸⁰ also considered the MPLR in the context of the right to return but in that case the focus was not on the definition of “job” but whether the role that the Respondent proposed that the Claimant should return to was suitable and appropriate employment.) In *Blundell* the EAT held that the specificity of “nature”, “capacity” and “place” were questions of fact which were for the tribunal at first instance to determine. On the facts, the EAT held that a reception teacher who returned to a role as a year two teacher was returning to the same job. Part of the rationale for this decision was the fact that the Respondent had a policy of rotating teachers through the different year groups, so that no teacher held a particular role permanently. On this basis, no teacher was guaranteed to have a particular role from one year to the next and therefore the claimant was not treated less favourably than any other individual. This demonstrates a problem with the current regime that was highlighted in Chapter 2: the need for assimilation with the current norm. The law fails to recognise that a woman returning from maternity leave has greater need of stability than most other employees²⁸¹. As such, the way in which other employees are treated is irrelevant. An employee should have the right to return to the same duties as they had prior to their maternity leave save where there are truly

²⁷⁹ [2007] ICR 1451

²⁸⁰ UKEAT/0227/13/JOJ

²⁸¹ Some other employees may also have an increased need for stability, for example, those who are returning to work after serious illness.

exceptional circumstances (for example, where there is a redundancy situation affecting the whole team/department/division in which the employee works).

Maternity leave as a concept

3.3.11 The danger of providing long periods of leave that are exclusively available for mothers to exercise, or where a father's entitlement to leave is entirely dependent upon the mother's, is that it privileges the mother-child relationship at the expense of the parent-child relationship. This means that fathers are seen as having a secondary role, which in turn means that the male norm is someone who is capable of fully dedicating himself to the workplace without distraction. McGlynn recognises this: "...while maternity leave is essential, if it is not complemented by changes in the role of men, it cements women's relationship to the home"²⁸². There is, therefore, a need to encourage more equal participation in childcare by fathers and one way of achieving this would be to allow fathers to take an equal amount of time off as women currently enjoy to spend with a new baby.

3.3.12 One argument that is often cited in support of longer periods of maternity leave is the need for women to breastfeed their babies. It is not strictly necessary for a child to be breastfed as there are substitutes (ie formula) that are available. However, the evidence suggests that breastfeeding is better both for the baby and for the mother²⁸³. As such, the Innocenti Declaration 2005 on Infant and Young Child Feeding²⁸⁴ recommends that countries adopt maternity protection legislation and other measures that facilitate six months of exclusive breastfeeding for women employed in all sectors²⁸⁵. However, this does not necessarily justify a long period of maternity leave. It is, for example, possible

²⁸² McGlynn (n205), 257

²⁸³ Rona Cohen, Marsha Mrtek, Robert Mrtek "Comparison of maternal absenteeism and infant illness rates among breastfeeding and formula-feeding women in two corporations", *Am J Health Promot* 1995 Nov-Dec 10(2), 148-153, whose study suggests that breastfed babies have fewer illnesses than formula-fed infants and that women that breastfeed their babies are absent from work less often. See also data from UNICEF which shows that breastfed infants are much less likely to die from diarrhoea, acute respiratory infections and other diseases, as well as helping protect from chronic conditions later in life such as obesity and diabetes. (http://www.unicef.org/nutrition/index_breastfeeding.html)²⁸³ There is evidence that long term, breastfeeding reduces type 2 diabetes and breast, uterine and ovarian cancer. [www.unicef.org/nutrition/index_24824.html]

²⁸⁴ UNICEF, <http://www.unicef.org/programme/breastfeeding/innocenti.htm>

²⁸⁵ This recommendation is not without controversy. A recent study published in the BMJ suggests that there is some benefit to early weaning (at around 4 months); Mary Fewtrell, Alan Lucas, David Wilson and Ian Booth "When to wean? How good is the evidence for six months' exclusive breastfeeding", *BMJ* 342 (7790), 209-212

for women to return to work and continue to breastfeed, subject to there being measures in place to facilitate breastfeeding. These measures should be guaranteed by law so as to avoid the situation in the US, where there is evidence²⁸⁶ that suggests that hourly workers are treated less favourably in terms of being allowed breaks for lactation and being provided with the necessary facilities to enable them to express milk than professional workers. There are also benefits to employers in allowing these measures as there is evidence to suggest that women who breastfeed their babies are absent from work less often²⁸⁷, as well as benefits to society because “...optimal breastfeeding and complementary feeding are essential to achieving the long-term physical, intellectual and emotional health of all populations...”²⁸⁸. Given the social importance of breastfeeding, we should view this as “...of equal importance to women’s workplace contributions”²⁸⁹.

3.3.13 I am not arguing here that there should not be any provision of maternity leave, just that it should be a short period and that this should be limited to the period that is necessary to allow women to recover from childbirth (which, in Chapter 2, I argued would be 6 weeks). Only if we do so can we move away from the privileging of the mother-child relationship to a situation where we acknowledge the importance of the contribution of both parents.

3.4 PATERNITY LEAVE (PATERNITY AND ADOPTION LEAVE REGULATIONS 2002, SI 2002/2788)

3.4.1 Having discussed maternity leave and pay, which applies only to women, I now consider paternity leave, which applies predominantly to men. I will consider ordinary paternity leave (“OPL”), and APL together as they are complementary.

²⁸⁶ Lisa Hansen (“A Comprehensive Framework for Accommodating Nursing Mothers in the Workplace”, 59 *Rutgers I Rev* 885 2006-2007) suggests that in the US there is a divide between professional and hourly workers whereby professional workers are provided with lactation rooms, breast pumping equipment and generous break time, but hourly workers are not, and do not have the same ability to structure their work lives.

²⁸⁷ Cohen et al (n283)

²⁸⁸ Innocenti Declaration (n284)

²⁸⁹ Reiter (n69), 17

Outline of rights

OPL

3.4.2 The right to OPL is summarised below:

3.4.2.1 A prospective father (or a person whose wife or partner is expecting a child) is entitled to up to two weeks' paternity leave if he²⁹⁰ satisfies certain conditions, including a requirement that he has been continuously employed for 26 weeks²⁹¹.

3.4.2.2 Paternity leave can only be taken from the date on which the child is born until 56 days after that date, (or if a child is born earlier than the expected week, 56 days after the date of the first day of the expected week of its birth)²⁹².

3.4.2.3 There are certain circumstances in which a prospective father may²⁹³ and others in which he must²⁹⁴ change the date of the start of his OPL.

3.4.2.4 There are provisions allowing an employer to require written notice of a prospective father's intention to take OPL²⁹⁵.

²⁹⁰ As paternity leave is a right predominantly used by men, throughout this chapter I will refer to "he" for convenience, although I acknowledge that a woman who is the partner of a pregnant woman will also be entitled to paternity leave. Similarly references to a prospective father should be read as including the mother's partner (irrespective of the sex of that person).

²⁹¹ These are that he had been continuously employed for at least 26 weeks at the fifteenth week before the child is expected to be born and that he has, or expects to have responsibility for the upbringing of the child. In the case of a man whose wife or partner is expecting a child that is not his, the legislation expressly states that the man must have the main responsibility (apart from that of the mother) for the upbringing of the child. (Paternity and Adoption Leave Regulations 2002 (the "PALR"))

²⁹² Regulation 5(2) PALR

²⁹³ A prospective father may change the date that he chooses to take paternity leave if he provides his employer with notice of this. The amount of notice that is required depends upon the circumstances of the change, but is generally 28 days before the proposed date unless it is not reasonably practicable to provide this period of notice.

²⁹⁴ If an employee chooses to begin his period of leave on a particular predetermined date, but the child is not born on or before that date, the employee must change the date of his period of leave. This can be done by substituting a later predetermined date or by specifying that his leave will begin on the date on which the child is born, or a date falling a certain number of days after the date on which the child is born. He must give his employer notice of the change as soon as is reasonably practicable, and must do so in writing if the employer so requests.

²⁹⁵ An employer can require the employee to give written notice (in or before the fifteenth week before the expected birth of the child, or if it is not reasonably practicable to do so, as soon as it would be reasonably practicable) of his intention to take paternity leave. This notice must specify (a) the expected week of the child's birth, (b) the length of period of paternity leave that he has chosen to take (as he may choose to take either one week's leave or two consecutive weeks) and (c) the date on which the employee has chosen that his period of leave shall begin. An employer may also request that an employee provide the employer with a

- 3.4.2.5 An employee must inform his employer as soon as is reasonably practicable after the child's birth, of the date on which the child was born²⁹⁶. The employer can require that this notice is given in writing.
- 3.4.2.6 An employee may only exercise his entitlement to paternity leave once for each pregnancy, thus if his wife, partner or mother of his child has a multiple birth, he is still only entitled to two weeks' leave²⁹⁷.
- 3.4.2.7 Those on OPL will be entitled to receive Statutory Paternity Pay ("SPP") subject to their earnings not falling below the Lower Earnings Limit for National Insurance purposes (the "LEL")²⁹⁸.

APL

3.4.3 The provisions relating to APL and the right to Additional Statutory Paternity Pay ("ASPP") are summarised below:

- 3.4.3.1 Fathers and the partners or spouses of a woman having a baby may be eligible for APL subject to meeting certain eligibility requirements²⁹⁹ and certain notification requirements³⁰⁰.
- 3.4.3.2 In order for an employee to be eligible for APL, the mother must be entitled to maternity leave, statutory maternity pay or maternity allowance in respect of the child to whom the employee's application for

signed declaration to the effect that the purpose of his absence from work is to care for a child or to support the child's mother and that he satisfies the conditions of entitlement.

²⁹⁶ Regulation 6(7) PALR 2002

²⁹⁷ Regulation 4(6) PALR 2002

²⁹⁸ The LEL for 2014/2015 is £111

²⁹⁹ The employee must be either the child's father or married to, or the civil partner of the mother of the child, and must have or expect to have the main responsibility (apart from that of the mother of the child) for the upbringing of the child. The employee does not have to provide documentary evidence of these facts (although the employer can request a copy of the child's birth certificate) but as part of the notice requirements, the employee is required to provide a declaration that he satisfies these conditions (referred to in the legislation as an "employee declaration").

³⁰⁰ In order to take leave, an employee must provide the following documents to his employer:

- (1) a notice specifying the child's expected week of birth, the child's date of birth and the dates that the employee wishes to take as leave (referred to in the legislation as a "leave notice"),
- (2) an employee declaration, and
- (3) a mother declaration.

In addition to these documents, an employee's employer may, within 28 days of receiving an employee's request for additional paternity leave, request a copy of the birth certificate of the child to whom the request relates and/or the name and address of the mother of the child's employer.

APL relates, and the mother must have returned, or for the purposes of the legislation be treated as having returned, to work³⁰¹. In addition, the employee must have 26 weeks' continuous service with his employer as at the week immediately preceding the 14th week before his child's expected week of birth (ie a total of 40 weeks' service at the expected date of the child's birth).

3.4.3.3 Eligible employees can take a period of up to 26 weeks' leave as APL subject to the mother of the child having returned (or being deemed to have returned³⁰²) to work. This leave can be taken after the 20th week after the child is born and within 12 months of the date of the birth.

3.4.3.4 Leave must be taken in complete weeks (with a period of two weeks' being the minimum amount that can be taken) and must be taken as one continuous period (much like maternity leave)³⁰³.

3.4.3.5 Where an employee is eligible for APL, they will also be eligible to receive ASPP, subject to their earnings meeting the LEL. The weekly rate of ASPP will be the lower of the following amounts: £138.18 or 90% of the employee's normal weekly earnings.

³⁰¹ The employee will have to provide his employer with a written declaration by the mother of the child to demonstrate that she satisfies these requirements (referred to in the legislation as a "mother declaration")

³⁰² Essentially this is where a woman's statutory maternity leave has ended and her entitlement to statutory maternity pay has ceased because she has returned to work

³⁰³ The legislation also provides for certain administrative requirements for leave to be taken, such as requiring an employee to notify his employer of the dates when he wishes to take APL, and allows the dates of APL to be varied by the employee prior to the period of leave commencing and by providing his employer with at least six weeks' notice of the change. Similarly once an employee is on APL he can also give notice to return to leave earlier than his intended return date by providing his employer with at least six weeks' notice of the new date. If an employee fails to provide this amount of notice, an employer can postpone his return to work so that the employer has six weeks' notice of the return date, which is similar to the maternity leave provisions. The new legislation also contains provisions modifying the entitlement to APL in the event of the mother's death, so that, in summary, the employee will be able to take a maximum of 12 months' leave, and this can be taken at any time from the date of the mother's death and the date which is 12 months after the date of the child's birth.

CRITIQUE

Eligibility

3.4.4 All mothers are entitled to maternity leave, irrespective of how long they have worked for their current employer. However, in order for a father to be eligible for paternity leave, he must have 26 weeks' continuous service. James correctly observes that "[b]y constructing paternity but not maternity leave as a right to be earned, available only once commitment to the workplace, albeit tokenistic, is demonstrated, further legitimises a father's role as breadwinner first and father, or 'supporter of' partner, second"³⁰⁴. This is problematic because it reinforces the ideologies of motherhood and fatherhood: a mother's role is to care; a father's is to contribute to the workplace..

3.4.5 A father's entitlement to APL is entirely dependent on the mother being eligible for maternity leave. If the mother is not eligible for maternity leave, irrespective of whether the father fulfils all the other eligibility criteria, he will not be eligible for APL. This seems entirely unfair and, following the CJEU case of *Roca Alvarez v Sesa Start Expansa ETT SA*,³⁰⁵ may not be permissible under the Equal Treatment Directive. *Roca Alvarez* concerned a Spanish law which allowed parents to take time off in order to feed a baby. Both parents were entitled to the same amount of time off, however a father's eligibility for the right was conditional upon the mother being an employee. The CJEU found that this was contrary to the Equal Treatment Directive and was liable to reinforce gender stereotypes by keeping the father's role as secondary to that of the mother's. However, the situation is far from clear cut. The case of *Betriu Montull v Instituto Nacional de la Seguridad Social*³⁰⁶ concerned a Spanish law which provided that maternity benefits could be voluntarily transferred to a father but only so long as the mother qualified for such benefits (ie the father's benefit was contingent upon the mother's eligibility but not vice versa). Mr Betriu Montull was not entitled to maternity benefit because his wife was self-employed and thus not eligible and he challenged thus on the basis that it amounted to

³⁰⁴ James (n15), p44

³⁰⁵ C-109/09, [2011] 1 CMLR 28

³⁰⁶ Case C5/12, [2013] ICR 1323

unlawful discrimination against men. The CJEU disagreed on the basis that this was "maternity" related and therefore was designed to protect the mother's health and safety by ensuring she had time to recover from birth, but also to protect "...the special relationship between the mother and her child in the period following the birth." The only difference between the *Roca Alvarez* case and that of *Betriu Montull* appears to be the label that attached to the leave – *Roca Alvarez* concerned breastfeeding leave, whilst *Betriu Montull* concerned maternity leave. In the latter case, the matter seems to have been viewed differently simply because the CJEU wanted to preserve the concept of maternity leave being distinct from everything else. This lack of clarity means that it is entirely unclear whether a challenge to the APL provisions, on the basis that a father's leave is dependent upon a mother's entitlement would be successful. This is yet another example of the privileging of the mother-child relationship; only if the mother is entitled to leave can the father be, thereby emphasising the primacy of the mother's role, whilst relegating the father to the status of secondary carer.

Length of leave

3.4.6 One of the most obvious differences between maternity leave and paternity leave is the length of leave that each parent is entitled to. Whilst women are entitled to one year, until 2012 men were entitled to just two weeks. They are now eligible for a further 26 weeks' leave as APL (and, as set out in Chapter 4, for those babies due on or after 5 April 2015, parents (of both sexes) will be able to share up to 50 weeks' Shared Parental Leave ("SPL")). This demonstrates the fact that the legislation envisages that the mother will take primary responsibility for the care of the child, thereby privileging the mother-child relationship.

3.4.7 The maternity leave provisions operate on the assumption that an employee will take her full leave entitlement. By contrast, the APL provisions do not make this assumption, instead an employee taking APL will have to inform his employer of when he intends to return. This suggests that there is an assumption that fathers will take a

shorter period of leave than mothers thereby reinforcing the traditional ideology of motherhood and the division of domestic responsibilities.

3.4.8 It is also noteworthy that the way that APL currently operates, only one parent can be out of the labour market on either maternity or paternity leave³⁰⁷. This does not provide parents with flexibility as some may prefer to both spend the first six months of their new child's life bonding with the child.

Low rates of pay

3.4.9 One of the main problems with paternity leave is the low level of pay that an employee will receive whilst on leave. The level of SPP is fairly low, being £138.18 per week, or 90% of the father's earnings if this is a lower figure. This is far less than an employee on minimum wage, working a 35 hours week, would receive after tax and national insurance deductions. Results from the Maternity and Paternity Rights Survey and Women Returners Survey 2009/2010³⁰⁸ reveal that, of those fathers who took time off after the birth of their child, 27% did not use paternity leave, but chose instead to rely upon annual leave or some other form of leave. It is interesting that this figure has not changed since a similar survey in 2005³⁰⁹ which showed that one fifth of those fathers taking leave after the birth of their child did not use paternity leave. No research appears to have been done as to why these fathers chose not to use paternity leave. It would seem likely that the reason for fathers using annual leave rather than paternity leave is that, whilst on annual leave, an employee is entitled to the same weekly wage as he would have received had he been at work. The low level of pay for paternity leave demonstrates the low value that society places on caring for a child. That value seems to be even lower where a father, rather than a mother, undertakes the care. Mothers receive 90% of their usual wage for the first six weeks of maternity leave, yet fathers always receive the very

³⁰⁷ The Government consultation on the Working Families Bill explicitly says this. It states that "...the intention behind the Additional Paternity Leave and Pay scheme is to allow a mother to return to work early, if she so chooses, and provide a mechanism for a father to take time off instead to care for the child. It is not the intention to encourage both parents to be out of the labour market at the same time for a long period of time."

³⁰⁸ Chanfreau et al (n273), which included findings that 91% of fathers took some time off after the birth of their baby but only 73% took paternity leave

³⁰⁹ Deborah Smeaton and Alan Marsh 'Maternity and Paternity Rights Survey, Employment Relations Research Series No. 50', March 2006

low level of £138.18. This seems most likely to be because a father taking time out of the workplace to care contravenes the ideology of fatherhood, which places greatest importance on a father's financial contribution.

3.4.10 The low level of pay for paternity leave is a disincentive to those considering utilising their right to leave, particularly in the context of men typically having higher earnings than women, as discussed in Chapter 1. The Government appears to have understood that the low level of pay would act as a deterrent for employees exercising their rights to APL; it estimated, prior to the implementation of the right to APL, that the uptake of APL would be between 4 and 8% of eligible fathers (10-20,000) and that the amount of time taken was unlikely to be greater than 13 weeks but could be considerably less³¹⁰. Due to the fact that the right to leave was only implemented in April 2010, there is limited statistical data regarding the uptake of the leave³¹¹. However, analysis by the TUC suggests that approximately 0.6% of those eligible to APL exercise their right to the leave³¹².

3.4.11 De Silva de Alwis has noted that men are often shut out of the caregiving benefits afforded to women workers³¹³. This can be seen in relation to the relatively low number of employers that appear to offer enhanced APP compared to the numbers that offer enhanced maternity pay. An IDS survey³¹⁴ found that approximately 60% of companies offered enhanced maternity pay. A survey of employers in relation to APL found that less than half this number, only 26.2%, offered enhanced pay for APL³¹⁵. Employers themselves appear to appreciate that the lack of pay is a reason for the low take-up of APL. One respondent noted that: "paternity leave is rarely used – most use holiday to cover as they can't afford to take the drop in pay".

³¹⁰ Final Impact Assessment - Additional Paternity Leave and Pay - January 2010

³¹¹ The BIS consultation document "Modern Workplaces: Shared Parental Leave and Pay Administration Consultation - Impact Assessment" acknowledges this noting that there is no reliable data regarding the take up of APL.

³¹² TUC press release dated 13 June 2013 (embargoed to 16 June 2013) - "Just one in 172 fathers taking Additional Paternity Leave".

³¹³ De Silva de Alwis (n23)

³¹⁴ IDS, "IDS Survey of Maternity and Paternity Leave 2011", 2011

³¹⁵ Rachel Sharp "XperTHR maternity and paternity pay survey 2011: paternity pay" IRS, 28 April 2011

3.5 Conclusion on gender specific rights

3.5.1 Gender specific rights do not seem to enable all parents to combine work with their family responsibilities; they retain the emphasis on women being the primary care-takers because women receive significantly greater periods of leave than men and are treated more favourably in respect of pay (receiving 90% of usual earnings during the first six weeks of leave, whereas if men elect to use the leave available to them, they only receive the flat rate of £138.18). In light of this, non-gender specific rights might better address the issue of reconciling work and family responsibilities.

CHAPTER 4 : NON-GENDER SPECIFIC PARENTAL RIGHTS

4.1 INTRODUCTION

4.1.1 In this chapter I will be considering non-gender specific workplace rights that enable parents to combine work and family: Shared Parental Leave (“SPL”), parental leave and Emergency Dependant’s Leave (“EDL”), the right to request flexible working, the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (“PtWR”) and the rights under the Working Time Regulations 1998 (“WTR”) to holiday and in relation to the maximum working week.

4.2 SHARED PARENTAL LEAVE

4.2.1 In the previous chapter I concluded that the gender-specific rights to leave were not necessarily helpful in enabling parents, rather than just mothers, to reconcile work and family responsibilities because they retain the emphasis on mothers as primary carers. SPL, introduced from 2015, has the potential to change this as it is a gender neutral form of leave. In order to consider whether this is likely to have the desired effect, I outline below the way in which the legislation will operate.

4.2.2 Where a parent is expecting a child whose expected date of birth falls on or after 5 April 2015, the parent will be eligible for SPL if s/he meets the eligibility requirements set out at 4.2.5 to 4.2.6 below. Parents do not automatically qualify for SPL – the mother must first opt out of the maternity leave regime. This can be done by the mother either returning to work or serving a curtailment notice.

4.2.3 The amount of SPL that can be taken is 50 weeks³¹⁶ less the amount of maternity leave taken by the mother. Leave has to be taken in multiples of complete weeks³¹⁷ and the minimum period that can be taken is one week³¹⁸ although both parents can take leave

³¹⁶ Except for those who work in a factory where compulsory maternity leave is 4 weeks rather than 2. The amount of SPL that can be taken in these circumstances is 48 weeks.

³¹⁷ Regulation 36(2) of the SPL regulations

³¹⁸ Regulation 36(4)

concurrently. A parent has a right to take a period of continuous leave and may request a discontinuous period of leave (but there is no right to take leave discontinuously).

4.2.4 In order to exercise the right to SPL, a parent must provide certain notices and declarations to his/her employer. I do not propose to set out further detail about this as, for the purposes of considering whether the leave will be effective in securing the ability of parents to combine work and family, the procedural aspects are largely irrelevant, save to note that the process is fairly complex.

4.2.5 To be eligible for SPL, a mother has to have at least 26 weeks' continuous service (the "duration of employment test"), be eligible for statutory maternity leave and have curtailed her maternity leave (or have returned to work). She also has to, as set out above, have provided certain notices and declarations (both by her and her partner) to her employer. Finally, she must have, or expect to have, the main responsibility for the care of the child. In addition, for the mother to be eligible for SPL, the father/her partner must: have been employed in any part of the week of at least 26 out of the 66 week period immediately preceding the expected week of childbirth and have weekly average earnings of at least the lower earnings limit (the "employment and earnings test") and have or expect to have (together with the mother of the child) the main responsibility for care of the child.

4.2.6 For the father/mother's partner, the conditions of eligibility are that s/he satisfies the duration of employment test and has or expects to have (together with the other of the child) the main responsibility for care of the child. As for eligibility of mothers, the father/mother's partner must have provided the employer with the required notices and declarations. In addition, for the father/mother's partner to be eligible, the mother must be eligible for statutory maternity leave or statutory maternity pay/maternity allowance, must satisfy the employment and earnings test and any maternity leave or pay must have been curtailed.

CRITIQUE

Eligibility

4.2.7 As set out above, the right to SPL is only triggered by the mother opting out of the maternity leave regime. The father's entitlement to SPL is therefore conditional upon the mother surrendering part of her leave; as with APL, this is another example of the privileging of the mother-child relationship which is hardly consistent with the message of "shared parenting". In a similar vein, if the mother is not eligible for SPL then the father/her partner can never qualify for the leave because under regulation 5(3) of the SPL regulations his/her eligibility is conditional upon the mother being eligible for maternity leave and statutory maternity pay or maternity allowance and satisfying the employment and earnings test.

Discontinuous leave

4.2.8 The offer of discontinuous leave is undermined by the fact that an employer can simply fail to respond to this type of request. In those circumstances the employee is left with two options: to withdraw their notice of leave or to take the leave that was notified in a continuous period. Unlike, for example, the right to request flexible working, there is no process by which the employer even has to consider the request for discontinuous leave. It would seem to be open to employers simply to have a policy of always refusing such requests, thereby reducing the usefulness of this provision. Discontinuous leave could, if used by fathers as well as mothers, have the effect of modifying the norm as it would change the pattern of continuous work. However, as it seems likely that take up by men will be very low (see further below for the reasons for this), in practice, this provision is unlikely to have this effect.

Pay

4.2.9 Pay is also likely to be an issue. SPL will be paid at the same flat rate as SMP (currently £138.18 per week). This is the case even in the first six weeks of leave; in contrast during the first six weeks of maternity leave an employee receives 90% of her

usual pay (falling to the flat rate thereafter). There is no obvious reason for this distinction other than the fact that maternity leave seems to be valued more highly than SPL. This shows privileging of the mother-child relationship, rather than the parent-child relationship. Where a mother takes time off in the form of maternity leave, she is paid more highly than when a parent (father) takes SPL because the mother could always opt to take maternity leave, rather than SPL. As discussed at 3.4.11, there is a disparity between the enhanced pay that employers offer for maternity leave and for paternity leave. It is not clear whether employers will offer enhanced payments for SPL. It is worth noting that the arguments that apply in respect of whether a failure to offer enhanced pay in respect of APL when enhanced pay is offered for maternity leave amounts to sex discrimination, discussed in Chapter 5, are equally applicable in respect of SPL. Indeed, some of the comments made in the *Shuter v Ford Motor Company* case discussed in that context could be particularly helpful in a challenge to a failure to offer enhanced pay for SPL where this is offered for maternity leave. The ET accepted that if a claimant was able to show that maternity leave had become detached from what was necessary to protect health and safety arising from the biological condition of pregnancy, then this would provide a basis on which someone could argue that the situation of a man taking SPL and a woman taking maternity leave were comparable. It is certainly arguable that the introduction of SPL has result in the decoupling of a large period of maternity leave from the purpose of preventing the disadvantage connected with the biological condition of pregnancy. James has suggested in the context of APL that “[e]arnings-related leave of a reasonable period, with no eligibility hurdles, to be taken during the first year following birth would better mirror the earning-related leave currently available to mothers...and provide a symbolic challenge to the view that mothers intrinsically and naturally make better parents”³¹⁹. This comment applies equally in respect of SPL – a better option would be for all parents, irrespective of length of service, to be able to take a period of leave that is paid at an appropriate rate. This is most likely to be the best way of encouraging both

³¹⁹ James (n10), p276

mothers and fathers to use this leave, and also change the privileging of the mother-child relationship by society to society valuing parenting.

4.2.10 SPL does not seem to take us much further than the existing APL provisions. It retains the emphasis on the mother as the primary care-taker, which is one of the most significant problems identified in Chapter 2. The major advantages of SPL are that women can surrender their entitlement to maternity leave much earlier, giving fathers the option of taking up to 50 weeks' leave, and that leave can be taken by parents concurrently. As set out above, the statutory pay provisions are unlikely to encourage fathers to use their entitlement, though as employers may enhance this, the uptake of leave may depend in part on the degree to which employers offer enhanced payment for SPL. The provisions on SPL do not, however, remedy some of the underlying theoretical problems with the current parental rights regime. There is no valuing of parenting as evidenced by the low levels of pay, which are even lower than for maternity leave. Mothering, rather than parenting is given priority as demonstrated by the father's entitlement being contingent on the mother choosing to use SPL (rather than staying on maternity leave). There is no change to the norm, which remains a male unencumbered worker with the worker with childcare responsibilities being the deviation from this.

4.3 PARENTAL LEAVE AND EDL

4.3.1 Parents may need time off from work at times other than a child's birth. Parental leave and EDL are intended to address this. In this section, I consider both rights together as they are complementary. Below, I outline the individual rights first, before considering whether in practice they allow parents to take time off from work when they need to.

Parental Leave

4.3.2 Parental leave is unpaid. It can currently only be taken up until the child's fifth birthday³²⁰ (or eighteenth birthday if the child is disabled³²¹), although from 5 April 2015,

³²⁰ Regulation 15(1), MPLR

³²¹ Regulation 15(3), MPLR

it can be taken up to the child's eighteenth birthday. In order to be eligible to take parental leave, an employee must have been continuously employed for a period of not less than a year³²² and must either be a parent to, or have parental responsibility for, the child in respect of whom they wish to take leave. Parental responsibility is defined with reference to the Children Act 1989 (the "CA") and is discussed further below at 4.3.12.

4.3.3 Employees who return to work after a period of up to four weeks are entitled to return to the job in which they were employed before their absence³²³. By contrast, where an employee takes more than four weeks' parental leave, the employer can prevent him/her from returning to the same job if it is not reasonably practicable to allow this. In these circumstances the employer must allow the parent to return to another job which is suitable and appropriate for him/her to do in the circumstances³²⁴.

4.3.4 The manner in which the entitlement to parental leave is conferred on employees is particularly complex and likely to be confusing to both employees and employers. However, in essence, unless the employer and employee reach an agreement³²⁵, then the default provisions contained in Schedule 2 of the Maternity and Parental Leave, etc Regulations 1999 (the "MPLR") (the "default provisions") will apply. These are outlined below at 4.3.7.

4.3.5 Employees that exercise their rights to parental leave, or seek to do so, are entitled not to be subjected to any detriment by their employer as a result. Similarly, if an

³²² Regulation 13, MPLR

³²³ Regulation 18, MPLR

³²⁴ Regulation 18,(2) MPLR

³²⁵ This agreement can be through an individual agreement with an employer, a collective agreement, a workforce agreement, however, even where an employer and employee conclude an agreement (whether that is an individual, collective or workforce agreement) on parental leave, there are certain rights that the employer must provide (essentially those which deal with questions of entitlement, the amount of leave that an employee is entitled to and the detriment provisions. The workforce agreement is a relatively new concept. It enables an employer to agree with the workforce collectively, even in a non-unionised workplace. In order to implement a workforce agreement, certain conditions must be satisfied. These include that the agreement (i) is in writing; (ii) has effect for a specified period (which cannot be more than 5 years); (iii) applies to either all the members of the workforce or to all the members of the workforce who belong to a particular group (e.g. catering staff); and (iv) is signed by the representatives of the workforce (who have been elected in accordance with paragraph 3 of Schedule 1 of the MPLR). If less than 20 people are employed by the employer, then the agreement may be signed by either the representatives or the majority of the employees employed by the employer.

employee is dismissed for a reason connected with the fact that the employee took (or sought to take) parental leave, this dismissal will be unfair.

Default Provisions

4.3.6 The default provisions limit the amount of leave that an employee can take per child to four weeks during any given year. They also limit the way in which leave can be taken (other than where the leave is taken for a disabled child) such that leave can only be taken in blocks of a week (the “**minimum period**”) or a multiple of a week.

4.3.7 The default provisions provide that an employer may postpone an employee’s period of parental leave if it considers that the operation of its business would be unduly disrupted if the employee took the leave specified in the notice³²⁶ (subject to the restrictions below). If the leave is postponed the employer must agree to allow the employee to take a period of leave at a later date³²⁷.

4.3.8 However, an employer cannot postpone the period of leave where the father is taking this on the date on which the child is born, subject to him complying with certain requirements. These are that the employee gives notice to his employer of his intention to take parental leave specifying the expected week of childbirth and the duration of the period of leave and that this notice is given to the employer at least 21 days before the beginning of the expected week of childbirth³²⁸.

EDL

4.3.9 The right to EDL³²⁹ entitles employees to take a reasonable amount of time off during working hours in certain prescribed circumstances. There are 3 which may be of use to parents: (i) if a dependant (including a child) falls ill or is injured or assaulted, (ii) if the employee needs to make arrangements for the provision of care for a dependant

³²⁶ Paragraph 6, Schedule 2 MPLR

³²⁷ The leave must be of the same duration as requested and must begin on a date determined by the employer (following consultation with the employee) that is no later than six months after the commencement of the requested date.

³²⁸ Schedule 2, MPLR

³²⁹ Section 57A ERA

who is ill or injured because of the unexpected disruption or termination of arrangements for the care of a dependant, or (iii) to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him³³⁰.

Remedies – EDL and parental leave

4.3.10 In the event that an employer refuses to allow an employee to exercise his/her right to parental leave or to EDL, the employee may present a complaint to an employment tribunal. S/he must do so within three months of the date when the refusal occurred, or within such further period as the employment tribunal considers reasonable if it is satisfied that it was not reasonably practicable for the employee to present his/her complaint within 3 months. The remedy for breach of the right is the same; an employment tribunal (“ET”) is required to make a declaration to the effect and may make an award of compensation to be paid by the employer to the employee. This shall be such amount as the ET considers to be just and equitable in all the circumstances.

CRITIQUE

“Parental Responsibility”

4.3.11 As set out above, only those who have “parental responsibility” for a child are entitled to take parental leave. The difficulty with this family law definition, though, is that whilst a mother always automatically acquires parental responsibility for her child, there are various circumstances in which the father of the child does not³³¹. This is not, of itself, necessarily problematic as an employee may still qualify for parental leave if he is registered as the child’s father under s10(1) or s10A(1) of the Births and Deaths Registration Act 1953³³² but it does again suggest the privileging of the mother-child relationship, rather than the parent-child relationship.

³³⁰ The other grounds, which are unlikely to be of use in this context are: to provide assistance on an occasion when a dependant gives birth or in consequence of the death of a dependant.

³³¹ Under the CA a father married to the child’s mother at the time of the child’s birth, automatically acquires parental responsibility but an unmarried father does not. An employee may also qualify for parental leave if he is registered as the child’s father under s10(1) or s10A(1) of the Births and Deaths Registration Act 1953

³³² Or in Scotland s18(1) or (2) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965

4.3.12 Another difficulty may arise where the relationship between the biological parents of a child breaks down (or alternatively if there was no such relationship in the first place) and one parent (who is likely to be the mother³³³) is left to look after the child by herself. If this woman then meets a new partner who cares for that child, the new partner is unlikely to have parental responsibility for that child as defined by the MPLR³³⁴. Thus the new partner will not qualify for parental leave. In such circumstances it may be that the only parent wishing, or able (under the legislation), to take parental leave will be the mother³³⁵. The legislation fails to alleviate the disproportionate responsibility women (especially as sole parents) bear for children. It also prevents those men who do not have "parental responsibility" as defined by the law but in practice care for a child from playing a fuller role in the lives of the children who they care for. Eligibility for parental leave should simply require that the person who wishes to exercise the leave is either the primary carer or the person who, other than the primary carer, has the main responsibility for the upbringing of the child. The issues described above do not arise in relation to EDL, where the right is to time off for "dependants" with this including a child or a person who lives in the same house as the employee, other than a lodger, tenant, boarder or employee. Given that the rights to EDL and to parental leave should be complementary, this misalignment in scope is surprising.

Limiting the number of parents able to exercise the leave

4.3.13 A number of the criteria that employees must satisfy in order to qualify for leave unjustifiably limit the number of parents who will be eligible for parental leave. The requirement that the parent taking leave has been continuously employed for a year (the "service requirement") seems to be particularly unjustifiable. The imposition of a service requirement suggests that time off to spend with a child is a right to be earned and a

³³³ 22% of children live in lone-mother households, whilst only 2% of children live in lone-father households – Office for National Statistics (<http://www.statistics.gov.uk/cci/nugget.asp?id=1163>)

³³⁴ This is because s/he will not have been married to the mother at the time of the child's birth and he will not be registered as the father of the child on the birth certificate, since he is not the child's biological father.

³³⁵ The biological father may not be able to take leave if he and the mother were unmarried at the time the child was born and if he was not registered as the child's father (because in such circumstances he would not have parental responsibility) or alternatively he may not wish to take parental leave because he has no contact with his child.

matter for an individual, rather than time spent with children being something that benefits society as a whole.

4.3.14 A Government white paper, published at around the time of the introduction of parental leave, stated that it believed that the qualifying periods for AML and parental leave should be aligned as far as practicable³³⁶. However, whilst all female employees are now entitled to maternity leave without any qualifying period, the qualifying period for parental leave remains at a year and there seems to be no justification for the retention of this. Similar issues do not arise in relation to EDL as there is no service requirement for employees to be able to exercise this right.

Unpaid Leave

4.3.15 Another characteristic that limits the usefulness of parental leave, by restricting the number of parents who are able to take the leave (rather than limiting the number who are eligible), is the fact that the period of leave is unpaid. This may account for the very low uptake.

4.3.16 There appears to be little difference in uptake between men and women. The most recent statistics on this are contained in the Fourth Work-Life Balance Employee Survey from 2012³³⁷, which suggest that 10% of women with children aged under 6 have taken parental leave in the last 12 months compared to 12% of fathers. Uptake for both parents is low and it may be that men's uptake is higher because they use parental leave during the first year of a child's life, whereas a mother can use maternity leave during this period. The difficulty with the leave being unpaid is in part due to the gender pay gap, discussed in Chapter 1. As Weldon-Johns has noted, the findings from European research indicate "... that the payment of [parental] leave is closely linked with male utilisation rates, as shown in the findings of the 2004 Eurobarometer survey of men throughout Europe"³³⁸. The lack of pay for parental leave shows that society does not value the time

³³⁶ White Paper 'Fairness at Work', May 1998, para 5.19

³³⁷ Sarah Tipping, Jenny Chanfreau, Jane Perry and Clare Tait, "Employment Relations Research Series 122: The Fourth Work-Life Balance Employee Survey", BIS, July 2012

³³⁸ Michelle Weldon-Johns (2013) 'EU work-family policies: challenging parental roles or reinforcing gendered stereotypes?' *European Law Journal*, 19 (5), 662-681, 670

that parents spend with their children, but instead sees it as a choice for the individual. We need to move away from this model to one where parenting is valued for the important social contribution that it is.

4.3.17 The default provisions impose a requirement that the minimum period of leave that may be taken is one week. This means that the unpaid nature of the leave is likely to have a greater impact on whether parents use their entitlement than if there was no minimum period (or this was a day). This is because loss of a week's wages is a greater financial penalty than loss of a single day's pay. Thus, if a parent needs to take only a single day's leave but they have to take an entire week's unpaid leave, some parents may be unable to afford to take this, and may choose instead, for example, to take a day out of their (paid) annual leave entitlement.

4.3.18 EDL is also a right to unpaid leave and since, by the very nature of the leave it is unplanned, parents may not have budgeted to be able to take unpaid time off work. The position regarding EDL can be contrasted with that of an employee taking sick leave. If an employee takes a minimum of four days off work as a result of illness s/he will be entitled to statutory sick pay (subject to, in certain cases, providing evidence of the illness). If a parent needed to take four days off work as a result of an unexpected event concerning his/her child, s/he would be entitled to nothing. In both cases the leave is unexpected and unplanned, in both there is no fault attached to the need to take time off work and in both if the leave is not paid the employee will have no income. Ultimately this means that the risk of an employee's child being ill falls solely on the employee. For the reasons set out in Chapter 1, it would be more equitable if this burden were to be spread more widely than on individual employees.

4.3.19 Whilst the right to EDL is a right to unpaid leave, some employers appear to go beyond the statutory right and offer full pay for this leave. The statistics show that women are slightly more likely than men to use EDL where this is unpaid (as opposed to in situations where employers voluntarily offer paid leave). According to research reported

in the Maternity and Paternity Rights and Women Returners Survey 2009/2010³³⁹, 9% of mothers had used unpaid EDL compared to 7% of fathers. The statistics also show that employers seem to be more willing to allow this time off to be paid for men than for women, with the same survey showing that 45% of mothers had access to fully paid time off for family emergencies, compared to 55% of fathers. This disparity is surprising – if an employer were to openly offer paid leave for male employees but only allow women to take unpaid leave, this would amount to direct sex discrimination (which is discussed in Chapter 5). As such, it seems more likely that the disparity is due to the fact that there is gender segregation in the workplace and therefore that some employers (who may employ greater numbers of men) may offer fully paid EDL whilst others (who may employ greater numbers of women) may offer unpaid EDL.

The Minimum Period of Leave

4.3.20 An example of the problems with the minimum period can be seen in *Rodway v New Southern Railways Ltd*³⁴⁰. In this case a father needed to take a day off work to look after his son (because his former partner, who normally looked after his son, needed to visit her disabled sister on this day), and applied for parental leave in order to do so. His employer rejected his request however Mr Rodway failed to turn up to work on that day and consequently was given a warning for non-attendance.

4.3.21 Mr Rodway brought an employment tribunal (“ET”) claim alleging that he had been subjected to detriment contrary to section 48 of the ERA in not being allowed to take the day off. He had argued that, despite the minimum period of a week’s leave, an employee should be allowed to take one day’s parental leave so long as that is deemed to be taking a week’s leave for the calculation of the employee’s entitlement to parental leave. The Court of Appeal rejected this argument and, in doing so, found that there was no valid request for parental leave and thus the warning Mr Rodway had been given was lawful.

³³⁹ Chanfreau et al (n273)

³⁴⁰ [2005] ICR 1162

Requirement that disruption be unexpected

4.3.22 The right of EDL was also of no use to Mr Rodway due to the requirement that the childcare disruption is “unexpected”. The ET ruled that Mr Rodway’s circumstances could not fall within section 57A of the ERA; in its view this was not an “unexpected disruption or termination of arrangements” as Mr Rodway had been informed by his former partner that she would be unable to look after his son 6 weeks before the event. The Employment Appeal Tribunal (“EAT”) upheld this decision. The issue of whether an event was “unexpected” was also considered in *Royal Bank of Scotland v Harrison*³⁴¹, an EAT case. This case took a slightly more pragmatic view of the term “unexpected” and it is interesting that the *Rodway* case did not appear to have been cited in argument despite the cases clearly being very similar. In *Harrison*, the Claimant’s childminder was unavailable to care for the Claimant’s child on 22 December 2006. The Claimant was only informed of this on 8 December 2006 and made a request for EDL in respect of 22 December 2006. This request was denied and, when the Claimant did not attend work on that day, she received a written warning. The ET held that the disruption to the Claimant’s childcare arrangements was “unexpected”; a decision which was upheld by the EAT. The EAT noted that, in its view the word “unexpected” did not involve a time element – this is clearly at odds with the decision in *Rodway* and given that both are decisions of the EAT, until this issue is appealed to a higher court, it is uncertain what the state of the law is in respect of this issue. This is clearly highly unsatisfactory.

Requirement for time off to be necessary

4.3.23 Caracciolo Di Torella is concerned that “[t]he judicial interpretation [of the right to EDL] has made it clear that the right is not there to care for a child or a dependant but simply to *arrange* alternative care...”³⁴². This is true in relation to how the courts have interpreted the requirement in the EDL provisions that the time off is “necessary”. In *Qua v John Ford Morrison Solicitors*³⁴³ the Claimant was dismissed for taking time off

³⁴¹ [2009] I.C.R. 116

³⁴² Caracciolo Di Torella (n27), 321

³⁴³ [2003] ICR 482

repeatedly to look after her son who had a recurring illness. The EAT held that EDL did not enable employees to take time off in order themselves to care for a sick child, except to the extent necessary to deal with an immediate crisis. The EAT also suggested that leave to provide longer-term care for a child would be covered by an employee's parental leave entitlement (subject obviously to the employee satisfying the qualification requirements for this). This therefore affirms the concerns raised by Caracciolo Di Torella: the right has been interpreted as not enabling the care of a child on a longer term basis, however, it would allow a parent to take a day or two as EDL to deal with a shorter illness. The difficulty with this position is that parents will not always have alternative childcare accessible to them or may not have childcare that they can arrange in circumstances where a child is unwell. Considering the latter first, even if a child has, for example, a nursery place, that nursery may not allow sick children to attend the nursery. Equally, if an employee works part-time during school hours, she³⁴⁴ may not have any other childcare arrangements because she would not ordinarily need these. If her child is then sick and unable to go to school for a period of time, following the logic in *Qua*, she would not be able to take this time off as EDL because, arguably, it would not be necessary to do so to deal with an immediate crisis. In both the circumstances described above, the parent would seem to need to take time off to care for the child, but the comments in *Qua* suggest that this is not permitted by EDL. The assumption by the EAT that parents would be able to take parental leave is not necessarily correct – an employee might not qualify for parental leave; she might have previously exhausted her entitlement to this right; or her employer may elect to postpone the leave. This issue illustrates the problem in developing distinct workplace parental rights rather than a single right to leave – there can be many situations in which an employee falls through the cracks and has no right to time off, despite clearly needing it to accommodate his/her childcare responsibilities.

³⁴⁴ Whilst it is possible that the part-time worker could be a man, given the statistics on part-time working discussed later in this chapter, it is more likely than not that a part-time worker would be a woman.

The right of postponement

4.3.24 The employer's right of postponement may frustrate the exercise of the right to parental leave. It is for that reason that Caracciolo Di Torella has suggested that postponement means that effectively "...employees can be denied [parental] leave at a time which they deem crucial and this does not make it particularly family friendly"³⁴⁵. For example, if Mr Rodway had applied to his employer for a week's parental leave and his employer had chosen to exercise its right of postponement, Mr Rodway would have been unable to take this week off, and still would not have had anyone to care for his child on the one day that he needed to.

4.3.25 Parental leave should enable parents to combine work and family by allowing parents to take leave when they need to in order to deal with a problem with their child (or children). The right of postponement means that employers can prevent employees from taking parental leave at the time the parents need time off. This is only possible because of the division between the private and public spheres, which enables the workplace to ignore the demands and needs of the private sphere (the family).

Conclusion on parental leave and EDL

4.3.26 One of the main indicators that the right to parental leave is not particularly helpful for parents is the relatively low numbers of parents exercising their right to unpaid parental leave. As set out above, figures suggest that only 10% of women and 12% of men with children aged under 6 have used parental leave at all within the last 12 months. The parental leave uptake figures for the UK can be contrasted with those of Sweden, where 45% of parental leave is taken by fathers³⁴⁶ and 72.1% of fathers take parental leave within the first two years of their child's life³⁴⁷. Parental leave in Sweden is very different from the leave of the same name in the UK. In essence, it combines the UK idea of maternity, paternity and parental leave into one entitlement which is shared between parents. Leave

³⁴⁵ Caracciolo Di Torella (n27), 325

³⁴⁶ Eurofound (2015), *"Promoting uptake of parental and paternity leave among fathers in the European Union"*, Publications Office of the European Union, Luxembourg.

³⁴⁷ Tobias Axelsson, *"Men's parental leave in Sweden: policies, attitudes, and practices"*, Joanneum Research, April 2014

is paid at up to 85% of current earnings³⁴⁸. Providing a period of paid parental leave could increase its uptake, thereby increasing its effectiveness as a right to allow parents to combine work and family.

4.3.27 One question not yet addressed in this chapter is whether this type of right to leave is even necessary for working parents. Caracciolo Di Torella and Masselot have suggested that “...parental leave has the potential to re-conceptualise the relationships between the state, the market and the family in terms of extended leave arrangements. It shifts the emphasis, at least on paper, from the health and safety, non-discrimination and employment rights of the mother to embrace the social rights of both parents”³⁴⁹. I agree that parental leave should be helpful in recognising the importance of parenting, as opposed to privileging of the mother-child relationship. However, the fact that parental leave is unpaid means that, in practice, there is a low level of uptake and, in practice it is “...certainly not one which promotes the involvement of the father”³⁵⁰. Further, as the leave is unpaid it reinforces the idea that the cost of parenting should be borne by the individual, rather than by society. As highlighted in Chapter 3, one of the difficulties for parents trying to combine work and childcare responsibilities is the way in which the workplace is structured. The right to time off is unlikely to assist parents with this type of issue. However, where it may assist is where an employee’s usual childcare arrangements are not appropriate in the particular instance (for example, where the usual childcare arrangements are based on the child being at school, childcare during the school holidays) and the employee needs to care for the child himself/herself. The other situation where leave may be appropriate is where childcare arrangements fail; this is where the right to EDL may assist. However, for the reasons set out above, there may be occasions on which parents’ needs are not met by either parental leave or EDL. It is important to note, though, that whilst the rights to leave are helpful to parents in

³⁴⁸ Compensation during the month of parental leave used exclusively by the mother or the father is 85%. 300 days of parental leave are compensated at 75 percent of wage and 90 days at the minimum rate (which is fixed rate, similar to the lower level of SMP/SPP that is paid in the UK).

Temporary parental allowance and pregnancy benefit is reduced to 75 percent of wage.

³⁴⁹ Caracciolo Di Torella and Massick (n1), 73

³⁵⁰ *ibid*, 327

combining work and family responsibilities, these alone (even if they are entirely effective), are not the only right that parents will need. An arguably more important area is how parents can combine their normal working day with their childcare responsibilities. The rights that may enable parents to do so are considered below.

4.4 EMPLOYMENT ACT 2002: RIGHT TO REQUEST FLEXIBLE WORKING

Outline of existing right

4.4.1 In addition to rights to time off work to look after children, the law also provides a right for all employees to request flexible working, subject to having 26 weeks' continuous service. Originally, this right only applied to parents who were requesting to work flexibly to allow them to care for a child. However, with effect from 6 April 2014, the right was extended to all employees. Agency workers are expressly excluded from the right to request flexible working, as are employee shareholders, save where they are returning from a period of parental leave.

4.4.2 The types of change to their terms and conditions of employment that an employee may request are restricted, although, since the Secretary of State has the power to make regulations to extend these, in future there may be a wider range of changes that an employee may request. Currently an employee may request (i) a change in the number of hours that s/he is required to work, (ii) a change to the times when s/he is required to work or (iii) to work at home for some or all of the time. There are also some formalities that employees must comply with when lodging their application³⁵¹.

4.4.3 Just as the types of changes that may be requested are limited to those specified by the statute, so too are the reasons that an employer may lawfully refuse an application. These are the burden of additional costs, detrimental effect on ability to meet customer demand, inability to reorganise work among existing staff, inability to recruit additional

³⁵¹ Under section 80F of the ERA the application must be in writing, state whether a previous application has been made by the employee (and if so, when), be dated and state that it is such an application.

staff, detrimental impact on quality, detrimental impact on performance and insufficiency of work during the periods the employee proposes to work.

4.4.4 There is no longer a set process that has to be adhered to when an employer receives a request for flexible working. Instead, the employer is obliged to deal with the request in a reasonable manner and to notify the employee of its decision within three months of the date of the request.

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4.4.5 One of the problems for parents with the current norm, discussed in Chapter 2, is the assumption that an employee will work the employer's normal working hours at such times that the employer has determined (and these have been determined to suit the needs of a worker who does not have caring responsibilities). One way to address this issue would be to change current working patterns. This might be achieved through employees having greater flexibility over their working patterns. Flexible working encompasses a whole range of different options, including working from a location other than the office, working at different times than the employer's usual working hours, and working part-time. It includes, for example, allow some workers to work remotely from home. Workers in London spend on average 74.2 minutes each day travelling to and from work (with the national average being 52.6 minutes per day³⁵²). Not needing to travel in this way would be a significant time saving and could enable parents to spend more time with children. Flexible working, if used by large numbers of workers, could alter the norm by changing not only the hours when people work, but also the locations from which they are expected to carry out that work. During the recession, many employers asked employees to work part-time as a way of avoiding redundancies³⁵³. Presumably the employees who volunteered (or were required) to work part-time were not viewed as being somehow less dedicated to their careers or jobs. As a result of this, part-time or

³⁵² Analysis by the TUC of official statistics from the ONS ([http://www.tuc.org.uk/work_life/tuc-17223-f0.cfm](http://www.http://www.tuc.org.uk/work_life/tuc-17223-f0.cfm))

³⁵³ BT, British Airways, KPMG, and several City law firms, including Norton Rose, Addleshaw Goddard, CMS Cameron McKenna and Pinsent Masons asked workers to work part-time hours with Ford, Honda and JCB being amongst some of the employers that asked their employees to work reduced hours.

reduced hours working patterns can gain more credibility both amongst employers and, more generally, in society.

4.4.6 Studies have also shown that working from home increases productivity³⁵⁴ and that home workers are less likely to leave their employer³⁵⁵, so there is also a potential benefit to employers where workers choose to utilise this type of arrangement. However, there can be downsides to working from home for the individual worker: there tend to be lower levels of promotion as a result of workers' lower level of presence in the office together with feelings of loneliness and boredom³⁵⁶. It is likely that the negative impact of working from home increases with the amount of time that a particular worker spends out of the office, in comparison to their peers. As such, a single worker choosing to work from home on a full-time basis is likely to fare far worse, than, for example, a worker who works from home one day per week where his or her colleagues have similar arrangements. Travis³⁵⁷ has raised concerns that some employers use home working for clerical staff to reduce their costs by reducing pay and benefits for the affected roles. This is not a flaw *per se* with flexible working – some employers will always try to reduce their costs by making adverse changes to their workers' working conditions. A worker could, for example, be engaged on a zero hours contract and have less security than other workers – this worker could equally be engaged to work at home or at the employer's premises.

4.4.7 However, working from home is not a solution for all the issues that parents face, not least because it will not be possible to work from home for all roles, for example, teachers, nurses, retail assistants and roles where there needs to be in-person interaction.

4.4.8 Crompton has suggested that "...one impact of flexible working is that the time boundary between 'work' and 'non-work' becomes increasingly blurred and

³⁵⁴ Christine Siegwath Meyer, Swati Mukerjee, Ann Sestero, "Work-Family Benefits: Which Ones Maximise Profits", *Journal of Managerial Issues*, Vol.13, No.1 (Spring 2011) pp28-44

³⁵⁵ Magid Igbaria, Tor Guimaraes, "Exploring Differences in Employee Turnover Intentions and the Determinants among Telecommuters and Non-Telecommuters", *Journal of Managerial Information Systems*, Vol.16, No.1 (Summer 1999) pp147-164

³⁵⁶ *ibid*; also S Tietze "When 'Work' Comes 'Home': Coping Strategies of Teleworkers and Their Families", *Journal of Business Ethics*, Vol.41, No.4 (Dec 2002), pp 385-396

³⁵⁷ Michelle Travis "Equality in the Workplace", 24 *Berkeley J Empl & Lab L* 285

contested”³⁵⁸. This would seem to be a possible downside to flexible working. However, it is not clear that flexible working has this effect because, as described above, flexible working encompasses a whole range of different options, from working different hours to “the norm”, to working less hours than the standard working week. In neither case does this necessarily seem to result in a blurring of the boundaries between work and non-work. Further, as discussed below, with mobile technology, workers can be expected to respond to emails and calls even during non-work time, so even without a flexible working arrangement, there seems to be an increased blurring of the work and non-work boundaries. The problem, as I highlight below, is that this blurring is very one-sided: whilst employers expect workers to be available even in non-work time, the worker’s family responsibilities are still not expected to impinge on the work sphere.

4.4.9 Another aspect of flexible working which may be of use to parents in combining work and family responsibilities is the ability to request part-time arrangements. De Silva de Alwis has suggested that we should veer away from this option and secure better childcare provision noting that “...in contrast to part-time work availability, which marginalises women and prevents them from fully participating in the market, publicly provided childcare is more likely to foster women’s labor market inclusion by providing real or symbolic support to all working parents, both men and women”³⁵⁹. I disagree. Part-time work that is low-paid and low-skill is an issue for working mothers, but this is not an intrinsic feature of part-time work. The right to request flexible working can, if it is effective, assist in enabling people to secure high quality, highly paid part-time work as it requires employers to consider (once a request has been made) whether a role is capable of being fulfilled on a part-time basis.

Continuous service requirement

4.4.10 It seems unfair that, in order to be able to work flexibly, an employee must have worked continuously for his/her employer for 26 weeks, particularly given that the

³⁵⁸ Crompton (n7), p99

³⁵⁹ De Silva de Alwis (n23)

employer has a number of grounds on which it can refuse the employee's request. This suggests that the right to request flexible working is a right to be earned by an individual, rather than recognising that parents' ability to reconcile work and family responsibilities is important for society as a whole. Further, there is a possibility that an employee who has left a previous employer because of discrimination over the fact that the employee has a child or the previous employer's refusal of a flexible work application could be applying for jobs with new employers and may wish to ask about the possibility of working flexibly. In such circumstances, the applicant has no protection whatsoever, and there is absolutely no obligation on the employer to even consider the possibility of flexible working under the right to request flexible working (although this may amount to indirect discrimination, which is considered in Chapter 5). For this reason, the Equality and Human Rights Commission ("EHRC")'s recommendation in its report, "Working Better"³⁶⁰ that the requirement that an employee has continuously worked for 26 weeks' be abolished seems sensible and fair.

Grounds for refusal

4.4.11 The Fourth Flexible Working Employee Survey³⁶¹ showed that the number of applications that were accepted was 79% (of which 61% were accepted without negotiation, compromise or an appeal) and the number of requests that had been declined was 13%. Whilst this is a relatively high success rate, it does not necessarily mean that the right is effective; it may be that employers would have voluntarily permitted employees to amend their working patterns or it may be that employees are less likely to submit requests in circumstances where they may not be accepted. Each of these possibilities is explored below.

4.4.12 The right to request flexible working initially appeared to increase the number of applications that were accepted. Figures from the First Flexible Working Employee Survey³⁶² showed that 86% of applications were accepted as opposed to the 77%

³⁶⁰ EHRC (n181)

³⁶¹ Tipping et al (n337)

³⁶² Tom Palmer, "Employment Relations Occasional Papers - Results of the first flexible working employee survey", Department of Trade and Industry, April 2004

acceptance rate which existed prior to the right to request flexible working being introduced³⁶³. However, in the Fourth Flexible Working Employee Survey, this figure had fallen to 79%, which is not much greater than the percentage of requests that were accepted prior to the right to request flexible working being introduced. There do, though, seem to be a greater number of employees working flexibly, which shows that the right to request flexible working may have had some success. According to figures from the Fourth Flexible Working Employee Survey in 2012, 60% of employees have worked flexibly in the last 12 months; this can be contrasted with the figures from the Second Flexible Working Survey in 2003 (there were no comparable figures for this from the First Flexible Working Employee Survey), which showed that 51% of employees had had some type of flexible working arrangement in the previous 12 months. These figures suggest that the right to request flexible working has had a positive impact on working patterns. However, as the same survey noted the increase is, in part, due to an increase in the numbers of employees regularly working from home which might be as a result of improvements in technology.

4.4.13 If the right to request flexible working was entirely successful, one would imagine that employees would generally be satisfied with their working arrangements and have no desire to make a flexible working request for this reason. However, research suggests that for a significant minority (12%) the reason that they have not made a flexible working request within the last two years is for a “business related” reason, such as it not being appropriate for that employee’s job, concern about the negative impact that flexible working might have on career progression or a perception that their employer would be unlikely to accept the request.

Reasonableness of any refusal

4.4.14 Under the regime on flexible working in force until 30 June 2014, it was clear that the right to request flexible working was very process driven, rather than looking at the

³⁶³ Jane Stevens, Juliet Brown and Caroline Lee “*Employment Relations Research Series No. 27 - The Second Work-Life Balance Study: Results from the Employees’ Survey*”, DTI, April 2004

reasonableness of the decision. However, the extended right to flexible working which applied from 1 July 2014 is less prescriptive about process, instead requiring an employer to deal with a request in a reasonable manner. The relevant ACAS Code of Practice³⁶⁴ suggests that this involves carefully considering a request and weighing the requested changes against any adverse business impact that the proposed flexible working arrangement might have. This would suggest that there may be more scope under the extended right to consider the reasonableness of the decision; although this is only likely to become clear once tested in litigation and, so far, there have been no such cases.

4.4.15 In addition, the case of *Ayodele v Compass Group plc*³⁶⁵ may offer some hope that the legislation could be applied in such a way as to prevent employers using the application process as simply a tick-box exercise. *Ayodele* did not concern the right to request flexible working, but the right to request work beyond retirement. However it is potentially of interest because in this case an ET held that the statutory obligation to consider an application must be performed in good faith and genuinely consider whether it should be accepted. Much like the legislation on the right to request flexible working, the legislation on the right to request to work beyond retirement consists of only procedural requirements. James³⁶⁶ has argued that there should be a right of appeal to the ET where a request for flexible working is unreasonably refused. This would be a significant improvement on the current legislation.

Men are less likely to make a request for flexible working

4.4.16 Another concern in relation to the right to request flexible working relates to the vast difference between the numbers of women and the numbers of men choosing to make requests. The Fourth Flexible Working Employee Survey found that whilst 28% of women had made requests in the last 2 years, just 17% of men had³⁶⁷. Given that these figures are percentages of all workers (i.e. not just those working full time) they will

³⁶⁴ "ACAS Code of Practice No. 5: Handling in a reasonable manner requests to work flexibly", ACAS, June 2014

³⁶⁵ [2011] IRLR 802

³⁶⁶ James (n10)

³⁶⁷ Tipping et al (n337)

include part-time workers, the majority of which are women, who are already working flexibly, and thus may be less likely to utilise this right. It should be noted that, to the extent that an employee feels that a decision is discriminatory, s/he may be able to bring a sex discrimination claim; I consider this separately in Chapter 5.

4.4.17 Past research³⁶⁸ into why some employees are reluctant to request flexible working patterns suggests that there are a number of factors, the main being perceived impact on career prospects. Given the ideology of fatherhood, discussed in Chapter 1, which places greatest importance on a father's financial contribution to his family, this type of detriment is likely to have a deterrent effect, in particular, on men. Other factors include incompatible organisational cultures, such as entrenched long hours' culture, heavy workloads, impact on earnings and infrastructure and technology not being in place. More recent evidence suggests that there has been no change in the perception by employees that working part-time will damage their career prospects. When asked how they felt about the statement: "People who work flexibly are less likely to get promoted", 38% of employees working full time with no flexible working agreed or strongly agreed with it³⁶⁹. There is clearly concern amongst employees that part-time working can damage career prospects. In order to dispel any such concerns that employees may have about part-time working, there needs to be evidence that working part-time will not affect career prospects. There is already a prohibition on discriminating against part-time workers in the form of the PtWR, and yet the concern that career progression may be affected by part-time working is still voiced. This may be because it would be relatively difficult for an employee to show that his/her career progression had been adversely affected by working part-time. Any effect is not likely to be apparent for a number of years, and finding another employee who is, and has been, in a comparable situation to the employee for a number of years to act as a comparator may prove impossible.

³⁶⁸ Jenny Kodz, Heather Harper, Sally Dench *"Work-Life Balance: Beyond the Rhetoric"*, Institute for Employment Studies, 2002

³⁶⁹ Tipping et al (n337)

Difference in outcomes depending on the sex of the applicant

4.4.18 A further problem is the fact that a higher number of requests made by men are declined than the number made by women that are declined: 10% of requests by women are declined compared to 18% of men³⁷⁰. There are two possible reasons for the difference in the figures (assuming that the male employees are being no less reasonable in their requests than female employees):

4.4.18.1 employers are acting in an overtly discriminatory manner and are deciding that they should prioritise requests of women over those of men because, for example, they believe that women should have greater responsibility for childcare

4.4.18.2 there is gender segregation in the workplace and, as a result, men are more likely to hold positions that employers believe are not suitable for flexible working and so decline applications from those in such roles.

4.4.19 The former reason is clearly discriminatory, but so is the latter, albeit less overtly. Employers should not make blanket judgements about the suitability of roles for flexible working. Each position should be considered individually, and most should be able to accommodate some sort of flexible working. The problem is often that the role has always been done on a full-time basis and so the employer is not open to the possibility of part-time or other flexible working.

Conclusion

4.4.20 The right to request flexible working is supposed to address the problem of part-time jobs being low-paid and low-skill, as, if this right worked effectively, it would allow those working full-time to change to part-time hours. Whilst the right to request flexible working appears to have had some positive impact on the number of employees working flexibly, there remain some issues. Of greatest concern is the fact that men seem to be less willing to make requests and seem more likely to have requests refused. In part, the former is related to concern about detrimental treatment arising from flexible working. I

³⁷⁰ Tipping et al (n337)

consider below the PtWR which are intended to address this in relation to part-time working.

4.5 PART TIME WORKERS (PREVENTION OF LESS FAVOURABLE TREATMENT) REGULATIONS 2000

4.5.1 Consideration was given above to how employees may request a change to their working hours or conditions to allow them to combine work and family. Employees are unlikely to request these changes unless they are protected against less favourable treatment as a result of their new working patterns. The PtWR endeavour to ensure that part-time workers will not be treated less favourably. Part-time working is often used by mothers to combine work and family; in one study³⁷¹ 42% of female part-time workers cited their childcare responsibilities as the reason for working part-time.

4.5.2 The following is a summary of the provisions of the PtWR. The regulations apply to workers, rather than just employees³⁷². Part-time work is defined by reference to the employer's definition of what constitutes full time work³⁷³. By way of example, an employee who works 35 hours per week will be a part-time worker if the employer usually requires workers to work 37 hours per week, but not if it usually requires workers to work 35 hours per week. Essentially the PtWR provide that a part-time worker should not be treated less favourably by his or her employer than the employer treats a comparable full-time worker unless such treatment can be objectively justified. In determining whether a part-time worker has been treated less favourably than a comparable full-time worker, the pro rata principle is applied, unless it is inappropriate³⁷⁴. A comparable full-time worker is someone who is employed by the same employer as the

³⁷¹ Walby and Olsen (n66)

³⁷² For a discussion of the differences between these terms see 3.1.3

³⁷³ Under regulation 2 of the PtWR, the definition is a worker who is "paid wholly or in part by reference to the time they work and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, are not identifiable as full-time workers". A full time worker is defined as is a worker who is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed under the same type of contract.

³⁷⁴ Regulation 5(3)

part-time worker under the same type of contract; both the part-time worker and the comparable full-time worker must also be engaged in the same or broadly similar work

4.5.3 There is one exception where a comparator is not required; where a worker has ceased to be a full-time worker and become a part-time worker, the worker can rely on a hypothetical worker who is employed on the contract which the worker was employed prior to becoming a part-time worker. This applies even where a worker has had a period of absence of up to 12 months between being a full-time worker and returning as a part-time worker³⁷⁵.

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4.5.4 It may seem self-evident, but the PtWR only offer protection to workers who work fewer hours than the employer's norm; they do not provide any protection for those workers who work from home or who work the normal number of hours but in a non-standard way. By way of example, in the case of *Gill Switalski v F&C Asset Management*³⁷⁶ the Claimant worked from home on a Friday to spend more time with her children, but found that she was questioned about why she was not in the office on these days. As she was not a part-time worker, the Claimant would not be able to bring a claim under the PtWR. As, in this case, there was a male comparator who also worked from home and was not quizzed about his flexible working arrangements, the Claimant could bring a direct sex discrimination claim, but in many cases the reasons that a parent who chooses to work flexibly will be subject to detriment (which in some cases maybe by being subject to additional scrutiny of their work in comparison to other workers) will not be as a result of his/her sex but simply the fact that they are working flexibly. Similarly, the fact that a parent cannot attend work during particular hours due to his or her childcare responsibilities will not result in that worker being a part-time worker, and thus the worker enjoys no protection under the PtWR for any detriment that follows for not being

³⁷⁵ There is one exception to this, where the employer can show that had the returning worker continued to work under the above contract, a variation would have been made to its terms during the period of absence, the contract on which the hypothetical worker will be employed will be a contract including that variation.

³⁷⁶ UKEAT/0423/08

able to work those hours³⁷⁷. It thus does nothing to address the fact that the norm is a male unencumbered worker and that there is a need for assimilation under the current theoretical framework. The lack of protection for working parents in these circumstances is clearly a failing in the current legislative regime. This particular problem again highlights the difficulties in using a piecemeal approach to providing rights to allow parents to combine work and family.

The comparator requirement

4.5.5 The requirement that the comparator be engaged on the same type of contract is problematic. As Fredman has noted³⁷⁸ employers may avoid their responsibilities under the PtWR by using agency workers to fill part-time roles. In this way full time workers and part-time workers would be employed under different types of contracts, and thus no comparator would be available³⁷⁹. This particular issue is of great concern in relation to zero hours contracts in light of the CJEU decision in *Wippel v Peek*³⁸⁰ that the contract of a zero hours' worker was not comparable to the contract that a full-time worker would be employed on. This leaves zero hours workers with very little protection – they work less hours than a full-time worker (and therefore, for the purposes of the PtWR, would be part-time workers) but enjoy no protection under the PtWR as there is no comparator. There are currently no statistics available on the number of working parents who are engaged on this type of contract and so it is difficult to assess whether these issues will have a disproportionate impact on parents. Unlike sex discrimination legislation, it is not possible for there to be a hypothetical comparator in PtWR cases³⁸¹ (other than, as set out at 4.5.3 where the part-time worker has transferred from full-time work for the same

³⁷⁷ This was the issue in *Chief Constable of West Midlands v Blackburn* [2008] EWCA Civ 1208. The Claimants were full time employees who were unable to work a 24/7 rotating shift pattern due to childcare responsibilities. Those employees working a 24/7 rotating shift pattern received additional remuneration. As the number of hours worked by the Claimants was the same as "normal", they would not have qualified for protection under the PtWR. (In this case, instead the Claimants brought an equal pay claim in respect of this matter.)

³⁷⁸ Fredman (n127)

³⁷⁹ This might be an attractive proposition to employers as agency workers also enjoy less rights and protections under the law. For example, they are not entitled to parental leave or EDL, and they have no protection under the unfair dismissal provisions in the ERA.

³⁸⁰ C313/02, [2004] ECR I-9483

³⁸¹ *Tyson v Concurrent Systems Incorporated Limited*, unreported, EAT0028/03 but note that this case is useful from a practical point of view, since it suggests that as well as considering the comparator proposed by the Claimant, if the tribunal finds that the proposed comparator is not a comparator for the purposes of the PtWR, the tribunal is obliged to consider whether anyone else is a comparator.

employer). The Summary of Regulatory Impact Assessment on the PtWR³⁸² estimated that of the 6 million part-time employees in Great Britain, only 1 million had a comparable full-time employee. This means that for those 5 million part-time employees without a comparable full-time employee, there is no protection, even where it is obvious that part-time employees are treated less favourably than full-time employees.

4.5.6 However, the requirement for a comparator on the same type of contract as the part-time worker is another illustration of the need for assimilation under the current theoretical framework. This clearly limits the PtWR's ability effectively to prevent all part-time workers (irrespective of the form of part-time working that they are engaged on) from being treated less favourably than full-time workers.

Gender divide

4.5.7 Almost three quarters of part-time workers are women³⁸³ and a considerably greater proportion (37%) of mothers with dependent children work part-time as compared to fathers with dependent children (6%)³⁸⁴. As such, one would expect that the overwhelming majority of reported cases would involve female claimants – however, of the reported decisions on the PtWR only 13 of 24 reported cases³⁸⁵ were brought by female claimants. This is because, just as MacKinnon has noted in the context of sex discrimination cases “[a]s applied, the sameness standard has mostly gotten men the benefit of those few things women have historically had...”³⁸⁶. Assimilation does not help in the parenting context because no-one already has the rights that are needed.

Do the provisions assist parents?

4.5.8 It is interesting that, whilst the PtWR have the capability of assisting parents in combining work and family, there are very few reported cases on the PtWR where this

³⁸² <http://www.dti.gov.uk/er/ptriasm.htm>

³⁸³ Between October and December 2014, there were 8.29 million in part-time employment, of which 2.15 million were men and 6.14 million were women. Office for National Statistics, Statistical Bulletin, UK Labour Market, February 2015, 18 February 2015

³⁸⁴ Labour Force Statistics (ONS) 'Gender Working Patterns' <http://www.ons.gov.uk/ons/about-ons/what-we-do/publication-scheme/published-ad-hoc-data/pre-june-2012/gender/index.html>. These statistics are in respect of the second quarter of 2011; currently no later statistics are available.

³⁸⁵ See Annex 3 for details of the cases

³⁸⁶ MacKinnon (n49), p35

was the reason for the litigation. Of 27 reported cases, only three³⁸⁷ were clearly brought by parents attempting to secure rights as part-time workers³⁸⁸. It is noteworthy that in all of these cases the claimants also brought indirect sex discrimination claims in tandem. This seems to suggest that the existing provisions prohibiting indirect sex discrimination may already have addressed the problems that the PtWR were designed to solve. (This might potentially explain why a disproportionate number of reported claims on the PtWR have been brought by men and why so few have been brought by claimants who are working parents). Further, there are also a number of cases which relate to parents working part-time and which have been brought under the indirect sex discrimination provisions rather than the PtWR and where the PtWR would not seem to have been capable of assisting the parents to combine their work and family responsibilities.

4.5.9 There is no protection in the PtWR that guarantees part-time workers the right to part-time working if they change role, for example if they are successful in applying for a more senior position. This occurred in the case of *Aviance UK Ltd v Garcia-Bello*³⁸⁹. Ms Garcia-Bello worked part-time. She successfully applied for a new job but her employer required her to work on a rotational roster basis (which she could not do due to her childcare responsibilities). There was no claim under the PtWR as Ms Garcia-Bello was not treated differently (or less favourably) than full time employees, all of whom would be required to work on a rotational roster basis. (The Claimant was successful in her indirect discrimination claim as she was able to show that women with childcare responsibilities suffered detriment through the use of fixed rotational shifts and the Respondent was not able to show that its practice of imposing these was objectively justified.) This issue is particularly important in light of the critique above which suggests

³⁸⁷ *Herbert Smith Solicitors v Langton* UKEAT/0242/05 and UKEAT/0437/05, *Ms C Short (Appeal No 2) v P J Hayman & Co Ltd* UKEAT/0379/08/CEA, *DR Simpson (Chilled Foods Ltd) v Stafford* EAT/440/01

³⁸⁸ There are a further seven cases where the claimants may have been parents, but it is not apparent from the facts stated in the judgement to determine this either way. *Sharma v Manchester City Council* [2008] ICR 623 (in this case there were multiple claimants, some of whom may have been parents trying to combine work and family responsibilities), *McMenemy v Capita Business Services Ltd* [2006] IRLR 761 (no information is provided as to why the Claimant was working part-time), *England v Turnford School Governing Body* EAT/438/02 (no information is provided as to why the Claimant was working part-time), *Hendrickson Europe Ltd v Pipe* EAT/0272/02 (no information as to why the Claimant was working part-time), *Royal Mail Group plc v Lynch* EAT/0426/03 (no information as to why the Claimant was working part-time), *James v Great North Eastern Railway* UKEAT/0496/04 (no information as to why the Claimants were working part-time) and *Carl v the University of Sheffield* [2009] 3 CMLR 21

³⁸⁹ UKEAT/0044/07/DA

that currently part-time work seems to be limited to low-value roles. Where a part-time worker demonstrates the necessary skills and experience to be promoted, the fact that an employer can require them to undertake the new role on a full-time basis and the PtWR provides no protection in these circumstances, means that effectively they allow employees to continue to restrict part-time work to low-value roles and does not guarantee the right to work part-time.

4.5.10 The other problem with the comparator approach is that it only guarantees equal treatment to that already received by full-time workers, yet there may be some aspects of a role that a part-time worker cannot adhere to because of the reasons for their working part-time. In these circumstances there is no protection under the PtWR. For example, in *Rollinson v P&B Baldwin*³⁹⁰ the Claimant had needed to work part-time in order to accommodate her childcare responsibilities. She had agreed with her employer that she would work on Tuesdays and Wednesdays and other shifts where her partner was available to look after their daughter. However, the employer's policy was that workers had to cover the shifts of others who were ill. The Claimant was unable to comply with this (due to needing to care for her child). Given that the policy applied to all workers, and not just part-time workers, there could be no claim under the PtWR as there was no less favourable treatment. However, this type of practice clearly significantly disadvantages those that are working part-time in order to care for a child (or any other dependent). Similarly, in *Banner Business Supplies Ltd v Greaves*³⁹¹ the Claimant was a part-time worker who worked part-time because of her childcare responsibilities. Her contract (and that of all other employees) provided that she had to assist with the employer's annual stocktake. The Claimant was unable to do so as she had no-one else to care for her child (and in this case, very little notice of the stocktake appears to have been given to allow workers to find any cover for this type of issue). Again, as there was no less favourable treatment, there could be no claim under the PtWR, despite the fact that the only reason that the Claimant worked part-time was to allow her to combine her job and

³⁹⁰ UKEAT/0873/04/CK

³⁹¹ UKEAT/0420/04/ILB

childcare responsibilities and requiring this type of flexibility/additional hours would clearly undermine this.

4.5.11 One of the difficulties with part-time work highlighted in Chapter 1 is the fact that many of the roles that are available on a part-time basis have low pay (and accordingly low prospects and status). The pay gap between full-time and part-time work is 38%³⁹². The PtWR seem to do little to address this issue; the issue with part-time work does not tend to be direct or deliberate discrimination, such that a full-time worker doing the same role is treated more favourably, but rather is the fact that part-time working arrangements are often only available for particular (low-paid) types of work. The PtWR do not assist with this, given the requirement to find a comparable full-time worker who is doing the same role. In fact, the equal pay provisions in the EqA 2010 may often be of greater assistance since they allow the worker to compare their terms and conditions not only with someone who is doing the same role as them but who is doing a different role, but one of equal value to the organisation. However, even these provisions do not address the problem of part-time workers being herded into low-value roles. They also do nothing to change the norm – which remains a full-time worker. This is the reason why those working part-time are often disadvantaged, because they can never comply with this standard.

4.6 WORKING TIME REGULATIONS

4.6.1 Although, the WTR are not specifically directly at enabling parents to combine work and family responsibilities, they may assist working parents in doing so. This is through the limitation of the number of hours that an employee may spend at work and by providing an entitlement to paid holiday. The WTR apply to workers, rather than just employees and, unlike the legislation discussed above in this chapter, they expressly

³⁹² See n41 for details of how this is calculated

include agency workers within their remit (save for one minor carve out³⁹³). The main provisions of the relevant sections of the WTR are summarised below.

Working time

4.6.2 A worker's working time, which includes overtime, is limited to 48 hours in a week. This 48 hour period is averaged over a reference period which is 17 weeks unless otherwise agreed by the parties³⁹⁴. However, employees can elect to opt out of the 48 hour working week subject to complying with certain requirements³⁹⁵. Where they do so, the employer must maintain lists of those who have opted out. There are no other requirements under the WTR 1998 that the employer keep any record of any other information.

Entitlement to Paid Holiday

4.6.3 Workers are entitled to 5.6 weeks' leave³⁹⁶ up to a maximum of 28 days (which is pro-rated if they work part-time). In order to take leave under the WTR the worker must give at least twice as many days' notice as the number of days the worker wishes to take leave. An employer is able to refuse the worker's request for leave so long as the worker is allowed to take holiday later in the year³⁹⁷. If the employer refuses the request for leave, it must give at least as many days' notice as the number of days' holiday requested by the worker³⁹⁸.

4.6.4 An employer can specify particular dates on which workers have to take some or all of their leave³⁹⁹ subject to providing the employee with at least twice as many days' notice as the number of days involved⁴⁰⁰.

³⁹³ This is where they are a party to the contract under which their services are provided and the status of that contract is not client/customer

³⁹⁴ The period can be altered by a workforce agreement, a collective agreement if this forms part of the contract between the worker and the employer, or any other agreement in writing between the worker and the employer so long as this agreement is enforceable as between the worker and the employer.

³⁹⁵ The agreement must be in writing and must be terminable on no more than 3 months' notice,

³⁹⁶ Regulation 13(12) WTR

³⁹⁷ Regulation 15(1), (3) and (4)

³⁹⁸ Regulation 15(2)(b), (3) and (4)

³⁹⁹ Regulation 15(2)(a)

⁴⁰⁰ Regulation 15 WTR

CRITIQUE

Working Time

4.6.5 Crompton has suggested "...controls over working hours would make a major contribution to a reconfiguration of employment and family life. If working hours were shorter, men would be enabled to increase their contribution to the work of caring, and women would be better enabled to avoid the 'mummy tract' of part-time work..."⁴⁰¹. It seems likely that limiting the number of hours that employees are obliged to work may better enable both parents (rather than just mothers) to care for their children. This would be consistent with a move towards valuing parenting. Research has shown that fathers are likely to regularly work over 48 hours per week⁴⁰². As such, the responsibility for childcare is more likely to fall to the other parent in the household, the mother. Given that men are likely to earn more than women, if one parent has to work fewer hours than the other in order to care for children, thereby reducing that parent's (and the household's) income, it is more likely to be the parent earning the smaller income who will reduce her hours. However, controls over working hours will only make a difference where those are effective and the WTR 1998 seems to have had little impact on the number of hours that UK workers spend at work. Analysis carried out by the Department for Business Innovation and Skills suggests "that the introduction of the WTRs had little discernible impact on total hours worked across the economy..."⁴⁰³.

4.6.6 The opt out is frequently criticised by those who believe its inclusion undermines the legislation. There is also some scope for questioning the validity of the opt-out. In the High Court decision of *Oakley v Animal*⁴⁰⁴ the defendant argued that the transitional provisions of the Registered Design Regulations (which was to implement Council Directive (EC) 98/71 (the "**Registered Design Directive**")) were *ultra vires*. Under the Registered Design Directive Member States were permitted, by use of a derogation, to

⁴⁰¹ Crompton (n7), p218

⁴⁰² According to one report over a third of fathers regularly work 48 hours or more. Laura Biggart and Margaret O'Brien, "*Fathers' working hours: parental analysis from the third work-life balance employee survey*", November 2009

⁴⁰³ Ciaran Devlin, Alex Shirvani, "*BIS Analysis Paper Number 5: The Impact of the Working Time Regulations on the UK market: A review of evidence*", BIS, December 2014, p7

⁴⁰⁴ [2005] EWHC 419 (Pat)

retain existing legislation for designs registered prior to the implementation of the Registered Design Directive. The UK chose to utilise this derogation by way of Statutory Instrument. The defendant successfully argued that, where a Directive contains a derogation, the Member State is not obliged to implement it but has the choice whether to do so or not. The defendant further argued that section 2(2) of the European Communities Act 1972 (the “ECA”) only allowed the Secretary of State to implement European legislation which the UK is obliged to enact, and not that which it is permitted to. As such any attempt to implement a derogation through the use of section 2(2) of the ECA would be *ultra vires*.

4.6.7 This decision in *Oakley v Animal* was the subject of a successful appeal to the Court of Appeal. In reaching their decision to allow the appeal, both Lord Justice Waller and Lord Justice May appear to have determined the case on the basis that these were transitional provisions allowing a former law to be retained. Since the opt out in the WTR is not a transitional provision, any comments by the Court of Appeal on this are not relevant to the validity of the opt out under English law following *Oakley*.

4.6.8 To the extent that Lord Justice Waller and Lord Justice May made comments relating to section 2(2)(b) of the ECA, these were general, and therefore of little practical use. Only Lord Justice Jacob refers to the application of section 2(2)(a) to derogations rather than transitional provisions, and it is arguable his remarks fail to appreciate the nature of derogations contained in regulations such as WTR. Lord Justice Jacob rejected the High Court’s decision as he found it to be “a non-purposive and irrational construction of s2(2)(a)” suggesting that in most cases implementing directives would involve making the choice of how to exercise an option specifically conferred by the directive. Whilst it is true that many directives do confer such choices upon the legislature, it must also be acknowledged that some of these choices are more significant than others, and for this reason should be enacted by primary rather than secondary legislation. As the Secretary of State in *Oakley* recognised, secondary legislation cannot be amended by either the House of Commons or the House of Lords and, as such, if the

legislation is unacceptable to members of either House the only course open to them would be to defeat the secondary legislation as a whole. In the case of the WTR, the decision to include the opt out (which is included permanently unlike the legislation in question in *Oakley*) was a very significant policy choice, since, for the reasons outlined below, it was made in order to reduce the efficacy of this legislation.

4.6.9 The reason for the legislator's attempt to minimise the impact of the WTR stems from the circumstances surrounding its enactment. The Working Time Directive had been implemented by the European Council under article 118A of the Treaty establishing the European Community. The UK Government (which was Conservative at the time) mounted a challenge to the legal basis of the Directive in March 1994 and sought to argue that it had been incorrectly implemented under article 118A as it did not relate to health and safety. The CJEU confirmed that the directive had been correctly implemented under article 118A of the treaty. The UK Government was thus forced to implement the Working Time Directive and so sought to minimise its effect through the use of the derogation.

4.6.10 By virtue of the fact that the derogation permitted by the Working Time Directive involved a significant policy decision, the derogation in the WTR can be distinguished from that contained within the Registered Designs Regulations. Lord Justice May's comments appear to relate to those derogations which are less significant which would exclude those, such as the one in the WTR, which have the effect of undermining the European legislation being implemented. The derogation in *Oakley* was less significant – it ensured that the new European legislation did not affect those designs that had been registered under the old regime. It is fairly common in English law for this to be done. For example, vast sections of the Companies Act 2006 (“CA 2006”) do not apply to companies registered before the CA 2006 became effective. These companies continue to be governed by the earlier legislation which has been superseded for new companies by the CA 2006. The derogation in the WTR is of a completely different character. It has the effect of undermining the European legislation rendering it less effective. It can therefore be argued that, notwithstanding the decision of the Court of Appeal in *Oakley v Animal*,

the opt out in the WTR is *ultra vires* because it was implemented by a Statutory Instrument, section 2(2) of the ECA⁴⁰⁵ not allowing such implementation because there was no obligation upon the UK to allow the opt out.

4.6.11 In addition to the constitutional arguments relating to whether the opt out is *ultra vires* the ECA, it may also be argued that the UK has not properly implemented the Directive as a matter of European law. The Directive provides that a Member State has the option not to implement the provisions limiting the working week to 48 hours while respecting the general principles of the protection of the safety and health of workers. It further requires that employers keep records of all employees who have opted out and that such records are available to the competent authorities which may prohibit or restrict the employer from allowing its employees to exceed the 48 hour week. However, whilst Regulation 9 WTR requires an employer to keep records on compliance with the WTR, this only applies “in the case of each worker employed by him in relation to whom they [the limits] apply”. As such, there is no requirement on UK employers to maintain records of the number of hours that an employee who has opted out of the 48 hour working week has worked, since the limits in the WTR will not apply to him/her.

4.6.12 A challenge might be made to GB legislation on the basis that the UK has not taken adequate measures to ensure the general principle of the protection of the safety and health of workers. In the House of Commons the Minister for Science (Lord Sainsbury of Turville) stated that “... if someone is considered to be at risk, the health and safety authorities will be able to obtain any further information, including the keeping of records necessary to protect the health and safety of workers through the use of existing safety law”. However, as at 1 March 2015 there were no records of any enforcement actions or prosecutions in the HSE database concerning employees that had opted out of the WTR.

⁴⁰⁵ This section provides that “...any designated Minister or department may by order, rules, regulations or scheme, make provision – (a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;...”

4.6.13 Finally, past research has suggested that those that enter into the opt out do not do so willingly; research conducted on behalf of the DTI in 2003⁴⁰⁶ showed that 44% of those that have signed an opt-out say that it was a condition of their employment⁴⁰⁷. Further, the same research suggested that some employers may flagrantly be breaching the WTR by pressurising workers who have not signed the opt out to work hours in excess of the 48 hour working week. There is no reason to suspect that there has been any change in this position. Labour Force Survey figures from 2013⁴⁰⁸ show that 58% of employees that usually work more than 48 hours per week they would prefer fewer hours, with the same survey showing that 13% of that group would prefer to work fewer hours even if it meant less pay. This suggests that not all workers who work long hours do so voluntarily.

4.6.14 There appears to be no effective mechanism for external monitoring of how many hours workers are working⁴⁰⁹ – as with the other “family-friendly” rights, the emphasis is upon an individual taking action against his/her employer. For the reasons set out in Chapter 6 this is far from ideal.

Annual Leave

4.6.15 Unlike the other rights to time off from work (i.e. maternity leave, paternity leave, EDL) the right to leave under the WTR is to leave paid at the employee’s usual wage. Therefore, none of the difficulties highlighted in respect of unpaid leave apply here. This also demonstrates that society as a whole recognises the importance of workers having time off.

4.6.16 The right to annual leave may have the effect of slightly modifying the norm. No longer is a worker expected to be available to work continuously; he is entitled to time off. This can be helpful for parents who might need the occasional day or week off to look

⁴⁰⁶ A Survey of Workers Experiences of the Working Time Regulations, DTI Employment Relation Series No 31, 2004

⁴⁰⁷ There is no update to this research.

⁴⁰⁸ ONS, 2013

⁴⁰⁹ Under the WTR, where an employer utilises the opt out, s/he is obliged to keep records showing the number of hours worked, however, there is no obligation to do so where the employer does not utilise the opt out – and these records are only required to be made available to an inspector appointed by the Health and Safety Executive or any other authority responsible for monitoring compliance with the WTR – there is no requirement to disclose this information to the employees (or their employee representatives, such as the trade unions) or to make it publicly available

after their child. However, the impact on the norm is reduced by the fact that employers are able to require workers to take their annual leave on particular dates. The case of *Sumsion v BBC*⁴¹⁰ is of concern in this regard. In that case, the worker, who was contracted to be available for work six days per week (including Saturdays) for a period of six months was required to take his annual leave in single days on every other Saturday rather than (as he wished) in a block at the end of the six-month period. The EAT found that this was permissible under the legislation.

Conclusion

4.6.17 The WTR should enable parents to combine work and family in two ways: by limiting the number of hours that parents have to spend at work (and thereby increasing the number of hours that they have to spend with their children), and by allowing parents to have paid time off from work. Unfortunately, the WTR seems to have had little impact on the former, and one of the key reasons for this seems to be the fact that the UK legislation includes an opt out from the 48 hour working week.

4.6.18 The opt out, is not the only derogation from the maximum working week. There is a further derogation in regulation 20 of the WTR which applies in relation to workers where their “working time is not measured or predetermined or can be determined by the worker himself”. Research suggests that currently employers tend to use the opt out “in preference to other derogations, as the most convenient and effective mechanism for avoiding the 48-hour limit on weekly working time”⁴¹¹. The same research notes that the scope of the unmeasured working time derogation was “highly uncertain” but that this was rectified by amending the WTR to broaden the range of workers that it applied to and include those whose working time was partly unmeasured or partly determined by the worker, by adding regulation 20(2). On this basis the research found that even without the opt out, many workers would still not be covered by the maximum working week as they would be covered by the unmeasured time derogation. However, in *EC Commission*

⁴¹⁰ UKEATS/0042/06

⁴¹¹ Richard Hobbs, Catherine Barnard and Simon Deakin, “Opting out of the 48-hour week: employer necessity or individual choice? an empirical study of the operation of article 18(1)(b) of the Working Time Directive in the UK”, *ILJ* 2003, 32(4), 223-252

*v UK*⁴¹² the CJEU found that regulation 20(2) meant that the UK had failed to fulfil its obligations under the Working Time Directive. Regulation 20(2) was repealed with effect from 6 April 2006⁴¹³. This significantly limits the application of the unmeasured working time derogation and, as noted, the prior position means that its application is “highly uncertain”. Whilst there is no doubt that, as noted by commentators such as Kenner⁴¹⁴ that employers would seek to make more use of the unmeasured working time derogation, given it only relates to workers whose time is unmeasured or determined by the worker, it would seem unlikely that it would allow the same number of workers to opt out. However, there are no statistics to show how many workers who opt out would be covered by the unmeasured time derogation. The inclusion of the opt out was a deliberate choice of the Government who wanted to limit the effect of the WTR, and it is this choice which undermines the effectiveness of the legislation and results in the maximum working week, failing to enable parents to combine work and family.

4.6.19 The requirement for workers to be provided with 5.6 weeks’ paid holiday can be of assistance to parents, but only where employers do not exercise their right to determine what days must be taken as holiday. Thus the effectiveness of this right as a tool for enabling parents to combine work and family responsibilities is questionable.

4.7 Conclusion on non-gender specific rights

4.7.1 In the preceding chapter, I concluded that the gender specific rights were fundamentally flawed because they retained the emphasis on mothers as the primary carers of children, rather than enabling parents to share childcare responsibilities. The non-gender specific rights do not share this flaw, however because there are separate rights, which have different rules attached, the law on parental rights becomes quite complex and this can result in the legislation not operating as a coherent whole. In most cases they do little to change the norm, which remains an unencumbered worker. Further,

⁴¹² Case C-484/04, [2006] ECR I-7471

⁴¹³ The Working Time (Amendment) Regulations 2006, SI2006/99

⁴¹⁴ Jeff Kenner “Working Time, Jaeger and the Seven Year Itch”, 11 *Colum J Eur L* 53 (2004-2005)

the rights themselves simply are not fit for purpose and in many cases an employee's most effective claim will be under the sex discrimination provisions. As such, in the next chapter, I consider to what degree the discrimination provisions are effective in enabling parents to combine their work and family responsibilities.

CHAPTER 5 : DISCRIMINATION

5.1 Introduction

5.1.1 The purpose of this chapter is to consider whether the discrimination legislation can be used to assist parents in combining work and family. I intend to follow the approach adopted so far and to consider the issues relating to pregnancy separately from those relating to childcare.

5.1.2 As only women can become pregnant, any detrimental (or different treatment) on the basis of pregnancy is connected to a person's sex. However, as outlined below, there have historically been some significant problems in applying the sex discrimination model to pregnancy related issues, not least the issue of who should be the appropriate comparator (discussed further below at 5.2.2).

5.1.3 Unlike pregnancy, detriment or differential treatment as a result of childcare responsibilities can be experienced by workers and employees of both sex. Often the reason for an employee or worker experiencing a detriment (or differential treatment) will not be because of the employee's sex but because the employee's attention is seen by the employer to be diverted from the workplace. This is because they are no longer able to comply with the norm of the unencumbered worker. As such, it may not immediately be apparent how sex discrimination legislation can assist. Indirect discrimination legislation has often been used for these types of issue, based on the fact that mothers typically have primary responsibility for childcare. There have also been some legal developments through the introduction of the idea of associative discrimination, which may mean that the prohibition on direct discrimination may also be of use for childcare type issues (further analysis of this is set out below at 5.2.21). It might also be of use if employers exhibit gender stereotyping behaviour by, for example, refusing to allow men flexibility in circumstances where they allow this for women.

5.1.4 Before analysing the effectiveness of the current sex discrimination provisions in enabling parents to combine work and family responsibilities, I outline the way in which

the prohibition on sex discrimination operates. The relevant provisions can be found in the Equality Act 2010 (the “EqA”) (previously these were contained in the Sex Discrimination Act 1975 (the “SDA”)). Under the EqA there are two relevant forms of discrimination: direct and indirect. (It should be noted that, for disability discrimination, there are additional forms of discrimination, including the duty to make reasonable adjustments.) The definitions of both refer to “protected characteristics”. For the purposes of analysing the provisions that may be of assistance to parents, I will focus on the following “protected characteristics”: (i) sex, (ii) marriage or civil partnership and (iii) pregnancy and maternity⁴¹⁵. However, in interpreting the definitions of direct and indirect discrimination the case law relating to the other protected characteristics may be of assistance. Given that direct and indirect discrimination are two very distinct concepts, I will consider each separately, starting first with direct discrimination.

5.2 Direct Discrimination

5.2.1 It is important to understand how the concept of direct discrimination has evolved. As such, I will first consider some of the difficulties that have at one time prevented the prohibition on direct discrimination from assisting parents in combining work and family responsibilities and how these have been overcome, before then moving on to consider the current law on direct discrimination in relation to sex, maternity and pregnancy and marriage or civil partnership.

Historical issues

5.2.2 Prior to the EqA, the prohibition on direct sex discrimination was contained in the SDA. Subsection 1(1)(a) of the SDA provided that “...a person discriminates against a woman if on the ground of her sex he treats her less favourably than he treats or would treat a man”. This provision was interpreted with reference to subsection 5(3) of the SDA which provided that where there was a comparison of the cases of persons of different sex under section 1(1) or (2), the comparison must be such that the relevant circumstances

⁴¹⁵ The other protected characteristics are: age, disability, gender reassignment, race, religion or belief and sexual orientation.

in the one case were the same, or not materially different, in the other. This demonstrates the way that direct discrimination is underpinned by the assimilation model. Similarly, section 3 of the SDA provides that there was discrimination if a person who was married or in a civil partnership was treated less favourably than someone who was not married or in a civil partnership.

5.2.3 A significant problem that women faced in seeking to rely on the prohibition on sex discrimination in connection with pregnancy was the requirement for a comparator. This was because in cases of pregnancy Employment Tribunals (“ETs”) initially insisted on including pregnancy (as distinct from the need for time off) as a relevant characteristic, which meant that it was impossible to find a man who had the same relevant circumstances (on the basis that a man can never be pregnant). In *Turley v Allders Department Stores Ltd*⁴¹⁶, the Employment Appeal Tribunal (“EAT”) held that dismissing a woman because she was pregnant did not amount to direct discrimination under the SDA. In *Hayes v Malleable Working Men’s Club*⁴¹⁷, the EAT approached the issue slightly differently, focussing on the reason for dismissal as being the need for time off by way of maternity leave. In *Webb v Air Cargo (UK) Ltd*⁴¹⁸, the Claimant had been employed to cover a maternity absence, but found out that she was pregnant, shortly after her employment commenced. The Respondent dismissed her on the basis that she was not available to do the job for which she had been engaged. The Court of Appeal held that there was no sex discrimination as she had been dismissed on the basis that she was not available to do the job she had been employed to do, rather than because of her sex. The domestic cases illustrated the problems, discussed in Chapter 2, with using a male (non-pregnant) norm as the reference point. The House of Lords referred the case to the CJEU as previous European decisions had not indicated whether in these circumstances it was possible to distinguish between not being available to do a job and pregnancy. The CJEU held that it was not.

⁴¹⁶ [1980] ICR 66

⁴¹⁷ [1985] ICR 703

⁴¹⁸ [1992] ICR 445 in the Court of Appeal; [1993] ICR 175

5.2.4 Following the intervention of the CJEU in *Webb*⁴¹⁹, the English courts were forced to recognise that pregnancy discrimination constituted direct sex discrimination and removed the need for a comparator in relation to pregnancy discrimination claims. However, the need for a comparator still existed in relation to other types of discrimination and, outside of the pregnancy sphere, parents still had to find a comparator (whether real or hypothetical) of the other sex in order to bring their discrimination claim. The legislation recognised that often it would be impossible to identify a comparator with the same relevant circumstances as the claimant and permitted the use of a hypothetical comparator⁴²⁰. This was a rather circular construction – in determining the characteristics that the hypothetical comparator was to have, the Tribunal had to reach a determination of the reason for the treatment of the Claimant. This issue was largely resolved by the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary*⁴²¹. In this case, the Claimant was a female chief inspector who had had her counselling responsibilities in respect of staff appraisals removed after complaints were made against her. The House of Lords noted that sometimes it was impossible to separate the question of (i) whether a claimant had received less favourable treatment than the relevant comparator and (ii) whether the less favourable treatment was on the grounds of sex. On this basis, it held that Tribunals could avoid the issue of identifying the appropriate comparator and instead concentrate on the reason for the treatment. The reason for Ms Shamoon's treatment was the fact that complaints had been made against her and not her sex. Later cases, for example, *Cordell v Foreign and Commonwealth Office*⁴²² have followed a similar approach noting that "...it is the reason why question that is in truth fundamental".

⁴¹⁹ [1994] ECR I-03567

⁴²⁰ There was contradictory case law on whether there was an obligation on Tribunals to consider a hypothetical comparator even where this was not pleaded – in *Bahl v Law Society* [2003] IRLR 640, the Court of Appeal held that an Employment Tribunal is not required to construct a hypothetical comparator but in some cases it would be prudent to do so, whereas in *Balamoody v United Kingdom Central Council for Nursing Midwifery and Health Visiting* [2003] IRLR 640 the Court of Appeal held that in circumstances where there was no actual comparator, the Tribunal had a duty to construct a hypothetical one. These issues are now irrelevant given that, following *Shamoon*, tribunals no longer are required to consider the comparator question in the same way that they had previously.

⁴²¹ [2003] UKHL 11

⁴²² [2012] I.C.R. 280

Current issues

5.2.5 Section 13 of the EqA sets out the definition of direct discrimination. This provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. This is a different from the SDA, where the test required less favourable treatment on the ground of B's sex. The change in language from "on the ground of" to "because of" may not be significant, however, the removal of the reference to B's sex, opens up the possibility of associative and perceived discrimination (for further discussion see 5.2.21 below).

5.2.6 There is an exception related to pregnancy and childbirth; where the person complaining of alleged discrimination is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth⁴²³.

Less favourable treatment

5.2.7 There is a fundamental issue with the test for direct discrimination for those who wish to use it in the context of securing rights for parents: the idea that treatment must be "less favourable" (the position in relation to maternity/pregnancy discrimination where the test is different is discussed further below at 5.2.9). This necessarily entails a comparison of the treatment of the claimant (most frequently a woman) with that of those of the opposite sex. As argued in Chapter 2, this type of comparative approach is not the best way to secure equality for parents; it relies on a male unencumbered worker as the reference point

5.2.8 One of the significant difficulties with any type of comparison is that it means that it is only possible, through the direct discrimination route, to secure the same treatment for women that is currently experienced by men. Direct discrimination cannot address issues around poor treatment where poor treatment is given to all (rather than one group with a protected characteristic being singled out for poor treatment) as when an employer runs the defence that their unreasonable treatment of the claimant was not

⁴²³ section 13(6)(b), EqA

discriminatory because they behaved equally badly to all employees⁴²⁴. Further, as discussed in Chapter 3, the normal working day and work patterns in general (for example, in terms of the expectation that employees will be physically located in their employer's premises, irrespective of whether this is actually necessary) are structured around a male norm which does not allow for any caring responsibilities. For this reason, securing the same treatment as is currently experienced by men does not assist employees/workers in combining childcare responsibilities with work. The situation is somewhat different in relation to pregnancy/maternity issues because, as highlighted above, the test for pregnancy/maternity discrimination is "unfavourable treatment" (rather than less favourable treatment) and thus, no comparator is required.

A different test for pregnancy/maternity discrimination

5.2.9 Sub-section 18(2) of the EqA provides that there is pregnancy/maternity discrimination where a person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably because of the pregnancy, or because of illness suffered by her as a result of it. As such, unlike the test for direct sex discrimination, there is no comparative exercise.

5.2.10 There is little reported case law on what is meant by unfavourable treatment and none in relation to section 18 of the EqA⁴²⁵. In *Equant Integration Services Ltd t/a Orange Business Services v Mr A Blitz*⁴²⁶, which concerned various issues of disability discrimination and constructive unfair dismissal, the EAT noted that there was a distinction between *unfavourable treatment* and *detriment*. It stated that the two were distinct concepts and that there could be unfavourable treatment which did not lead to detriment (for example if no loss or injury were to be caused). However, on the facts of

⁴²⁴ For example, in *Glasgow City Council v Zafar* [1998] IRLR 36. There have been attempts to row back from this position – for example, *Anya v University of Oxford and another* [2001] IRLR 377 (CA), where Court of Appeal stated that there would need to be evidence of the equally bad treatment to all employees, rather than simply an assertion by the employer that this was the case. In *Bahl v Law Society and others* [2004] IRLR 799 (CA) the Court of Appeal interpreted *Anya* as showing that "discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it." This was subsequently approved in *Igen Ltd and others v Wong and other cases* [2005] IRLR 258.

⁴²⁵ There are two reported cases on s18 EqA: *Maksymiuk v Bar Roma Partnership*, UKEATS/0017/12 and *Hair Division Ltd v Macmillan*, UKEATS/0033/12 but neither deal with what is meant by the term "less favourable" treatment

⁴²⁶ UKEAT/0259/07, UKEAT/0276/07, UKEAT/0500/07

this particular case⁴²⁷, the EAT felt that the two issues (detriment and unfavourable treatment) could be dealt with together. On the basis of these comments, it would appear that “unfavourable treatment” may be wider than “detriment”⁴²⁸ since there is no need to show that the claimant has suffered any loss or injury as a result of the employer’s treatment, just that the treatment occurred. That said, discrimination will only be unlawful if the relevant act falls within the scope of the legislation. In relation to employees, this is set out in s39 of the EqA. This provides that it must relate to the terms of employment, the manner in which an employee is afforded access to benefits, facilities and services, dismissal or any other detriment.

5.2.11 Detriment itself seems to have a relatively wide definition. In *Shamoon* the House of Lords held that there was no need to demonstrate some physical or economic consequence in order to show detriment but that “...the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work”. As such, the broad interpretation of unfavourable treatment would seem to be helpful for those bringing a direct discrimination claim. It is interesting, however, that the need for a comparator still applies in all other instances. This significantly limits the usefulness of the direct discrimination provisions in trying to secure rights for parents because it relies on the assimilation model.

“Because of”

5.2.12 In order to show direct sex discrimination, the claimant must show that the less favourable/unfavourable treatment is because of sex. The early cases, where the test

⁴²⁷ Mr Blitz was employed in a role akin to that of an accountant and resigned in response to what he felt to be discriminatory treatment. He brought claims for constructive unfair dismissal, various forms of disability discrimination (direct, failure to make reasonable adjustments, harassment, victimisation), indirect and direct discrimination on the basis of religion or belief, detriment/dismissal as a result of trade union activities and a claim in respect of annual leave accrued during sick leave. One of the allegations relating to disability discrimination relating to the fact that his bonus has been reduced as a result of his absence and it was in this context that the EAT considered the issues of “detriment” and “unfavourable treatment” but felt that in any event, reduction of a bonus would have obvious consequences for an individual and therefore there was no basis on which to argue that it was not a detriment or unfavourable treatment.

⁴²⁸ Paragraph 34 of the judgement states “Plainly there can be unfavourable treatment which does not lead to detriment, if there is nothing which can be described as loss or injury caused, or even emotional damage suffered to or by the victim”

under the SDA was “on grounds of” the claimant’s sex applied a “but for” test⁴²⁹ (ie but for the claimant’s sex s/he would not have been treated less favourably). Later cases have focussed instead on the reason (or the ground) for the treatment⁴³⁰, which seems to be narrower than a “but for” test⁴³¹. It is easy to see how a woman who was subjected to unfavourable treatment on the basis that she was pregnant would be able to show that this was because of her sex (as pregnancy is invariably connected to sex, given that only women can become pregnant). There is no longer any need to link pregnancy to sex now as pregnancy is a protected characteristic in its own right under the direct discrimination provisions. Often though discriminatory behaviour does not manifest itself in such an obvious way.

5.2.13 For women who are absent from work on maternity leave, a significant concern will be whether they will be able to return to the role that they held prior to their absence. The provisions on sex discrimination could assist in these circumstances if the only reason for the woman’s roles being changed was because she was pregnant or on maternity leave. This would amount to direct sex discrimination. The difficulty, though, would be in showing that the treatment was because of the employee’s sex/pregnancy/maternity leave rather than, for example, because of a financial reason or a restructuring which happens to occur during the employee’s leave. This can be seen in the case of *S G Petch Ltd v Mrs S English-Stewart*⁴³².

⁴²⁹ For example, in *James v Eastleigh Borough Council* [1990] 1 QB 61, which concerned a practice by a council-run swimming pool of allowing free admittance for those of pensionable age. This meant that women aged 60 and above were admitted for free, but men had to be aged 65 and above to qualify for free admittance. The Court of Appeal had held that this did not amount to unlawful direct discrimination on the basis that the reason for the differential treatment was not the individual’s sex but was because of the difference in pensionable age and therefore was not “on the grounds of” sex. The House of Lords overturned this, holding that “but for” Mr James’ sex, he would have been given free admittance to the swimming pool.

⁴³⁰ For example, in *Amnesty International v Ahmed* [2009] I.C.R. 1450, the EAT stated that the “but for” test used in relation to causation was not appropriate in discrimination cases and that “[t]he fact that a claimant’s sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment”.

⁴³¹ By way of example, in the case of *Martin v Lancashire Ltd t/a European Telecom Solutions* [2004] UKEAT 0525/03/2203, which concerned a female employee who was dismissed after the end of an affair with the managing director at her employer, the claimant argued that “but for” her sex she would not have been in a relationship with her manager and therefore would not have been dismissed. The EAT rejected this argument, finding that her dismissal was not “on the grounds of” her sex. Whilst this is a sensible decision (on the basis that the claimant was disadvantaged because she had had a relationship with her manager, rather than because she was a woman) it illustrates the fact that the “but for” test is wider than the current test.

⁴³² UKEAT/0213/12

5.2.14 The Claimant, Mrs English-Stewart, worked on a part-time basis (3 days per week) as a manager in S G Petch's sales and marketing department. When she went on maternity leave, S G Petch did not appoint anyone as temporary maternity cover for the role, instead electing to allow its existing staff to take on the various tasks that comprised the Claimant's role. Because it was possible to cover the Claimant's role without bringing in additional staff, S G Petch determined that her role was no longer required. As such, the employer believed that there was a redundancy situation⁴³³ and ultimately dismissed the Claimant by reason of redundancy. The termination was not discriminatory because the reason for the employee's dismissal was a redundancy situation (the EAT referred back to the tribunal the question of whether this redundancy situation also applied to other employees, in which case the Claimant could challenge her selection for dismissal). However, it would seem that the only reason that the employer was able to identify the fact that it could restructure its sales and marketing department was because Mrs English-Stewart was on leave.

5.2.15 The EAT noted that "if in fact it [a dismissal which is only identified during an employee's maternity leave] is not connected with maternity leave, then there is a real problem for a woman taking maternity leave that it may turn out in her absence not simply that someone else is better at the job than she but that her job itself is unnecessary, because it does not need to be carried on by anybody in her absence, thus revealing a redundancy situation, such as was the case here. It appears to us that it must be that such a position falls within the rubric 'connected with maternity leave'." The EAT seems here to acknowledge that the redundancy situation might only have arisen because of Mrs English-Stewart's maternity leave (hence the fact that it was "connected with maternity leave"). However, the ET was directed to consider whether the employer was in breach of the Maternity and Parental Leave, etc Regulations 1999 ("MPLR"); the effect of this

⁴³³ It should be noted that there is a separate issue in this case as to whether the redundancy situation applied only to Mrs English-Stewart's role or also to others as regulation 20 of the MPLR provides that where the employment of an employee on maternity leave is terminated and there are other employees who held positions similar to that employee who were not selected and the reason for this was connected with the fact that the employee had taken maternity leave, then this will be an automatically unfair dismissal. This would also almost invariably amount to direct discrimination on the grounds of pregnancy/maternity leave (as the selection will be tainted by reason of pregnancy/maternity).

would be that her dismissal was unfair, but it would not have amounted to unlawful discrimination (because the reason for her dismissal was the redundancy situation and not her sex/pregnancy/maternity leave).

5.2.16 It may well have been the case that, had one of the juniors in the department⁴³⁴ been out on leave, her role (rather than the Claimant's) would have been felt to be superfluous. Indeed, this would seem to be the reason why the Tribunal was directed to consider whether other employees were in a similar situation to Mrs English Stewart (and therefore whether the relevant employees should have been pooled and appropriate selection criteria applied). In these circumstances, it is possible that the Claimant could have tried to argue that the decision not to pool amounted to sex discrimination, however, the EAT did not direct the Tribunal to consider this issue.

5.2.17 In *Petch* the only reason that Mrs English Stewart's role was precarious was the fact that she was on maternity leave, allowing the employer to identify potential efficiencies. Whilst ultimately the reason for the dismissal (redundancy) may not directly have been because of the Claimants' maternity leave, there was an indisputable connection between the two.

5.2.18 The prohibition on direct discrimination may also be of no assistance to women who are disadvantaged by their employer's actions, where this disadvantage only occurs because they are on maternity leave or have childcare commitments, but where the reason for the employer's actions is unconnected to their sex /pregnancy/maternity status. The case of *Chief Constable of Hampshire v Haque*⁴³⁵ illustrates this point. The Claimant, Ms Haque, was subjected to a disciplinary process which related to events that had occurred in August 2006 (prior to her maternity leave which had started by April 2008). However, there was a delay in disciplining Ms Haque in relation to these issues and the disciplinary hearing was scheduled during her maternity leave. The fact that the disciplinary hearing was conducted during the Claimant's maternity leave placed her, as a new mother, at a

⁴³⁴ The sales and marketing team was comprised of Mrs English-Stewart (manager), Mr Smith (graphic design specialist), Ms Anderson (junior member of the team) and Ms Eavans (junior member of the team).

⁴³⁵ [2012] Eq. L.R. 113

profound disadvantage: she was unable to properly prepare her case as she was caring for her new baby; she had to leave the hearing, when it took place, to attend her child; and she had to travel to and from the misconduct hearing, disrupting her young baby's routine. The EAT appeared to accept that the Claimant had suffered unfavourable treatment. However, it found against the Claimant in relation to direct sex discrimination as the reason for the unfavourable treatment was not her sex (or the fact she was on maternity leave). This appears to be an example of a case in which the employer should have been required to make adjustments to its usual process to accommodate the employee's maternity leave and her associated childcare needs. There was, however, no direct discrimination because the employer did not treat Ms Haque in the way that it did as a result of her sex or the fact that she was on maternity leave⁴³⁶; the issue was that it had failed to accommodate her needs as a new parent.

5.2.19 Often the issues that parents (and particularly working mothers) face are not as a direct result of their sex but are related to the fact that they have children. Women are currently particularly disadvantaged by this because of the sex-differentiated roles concerning childcare. However, parental rights need to be based on more than just prohibitions on sex discrimination because if the aim (as explored in Chapter 1) is to encourage both parents to take equal responsibility for childcare, then only securing rights for women will be counterproductive in the long-run. The *Cordell* case mentioned above at 5.2.2 is interesting in this context as it shows the limitations of direct discrimination where an employee requires an accommodation. Ms Cordell was a deaf employee whom had been provided with a lipspeaker for previous roles with the same employer. She was offered a role in Astana, Kazakhstan, subject to an assessment of whether accommodation of her disability could be made and the cost of this. Her employer determined that the costs (which after various modifications to the length of the

⁴³⁶ *British Telecommunications plc v Roberts and another* [1996] I.C.R. 625 is another case where this issue can be seen. Here, the EAT held that a refusal to allow two female employees, who were returning from maternity leave, to be employed on a job-share (previously both had been full time) could not be said to be "on the grounds of sex". Although the request was connected with pregnancy insofar as the pregnancy had resulted in the women having childcare responsibilities, the refusal was not "on the grounds of sex". In fact the EAT found that "[t]here was no evidence...to suggest that a man would have fared any better" again demonstrating the fact that direct discrimination is of little use in securing rights for mothers (with the possible exception of providing protection where there is a very direct link to pregnancy/maternity).

assignment and its scope were assessed to be £606,397 over a two year period) were such that the accommodation of her disability was not reasonable. The EAT held that the reason why Ms Cordell was not given the role in Astana was the cost of the adjustment, not her disability. Applying this logic to the issues facing parents in the workplace, it is likely that employers will be able to show that it is not the fact that an employee is, for example, a mother, that causes the disadvantage, but rather her need for time off or reduced hours.

5.2.20 As such, direct discrimination is unlikely to enable parents to combine work and families as it only helps to secure rights that those conforming to the male norm (ie those who do not have caring responsibilities) already have.

Associative discrimination

5.2.21 Associative discrimination is a relatively newly utilised⁴³⁷ concept in English discrimination law⁴³⁸. In *Coleman v Attridge*⁴³⁹ the Claimant, Ms Attridge, brought a direct disability discrimination claim on the basis that she had been treated less favourably because of her disabled son. Whilst being a child *per se* is not a protected characteristic, age is. As such, it may be possible for those with childcare responsibilities⁴⁴⁰ to construct an argument that less favourable treatment of them, on the grounds of these responsibilities, is direct age discrimination. Before we examine this further, it is worth noting that there is one drawback to using age rather than any other protected characteristic: age is the only protected characteristic which includes a justification

⁴³⁷ Arguably it is not a new concept. There is no reference in the legislation to “associative discrimination” rather it is the interpretation of the phrase “on the grounds of” / “because of” that gives rise to the possibility of discrimination by association.

⁴³⁸ Although *Coleman v Attridge Law* ([2008] All E.R. (EC) 1105) has been attributed as developing the concept, arguably there were a few cases prior to this which laid the foundation for the possibility of this type of discrimination. These include: *Showboat Entertainment Centre Ltd v Owens* [1984] 1 WLR 384, where the Claimant was successful in showing that he had been discriminated on racial grounds after he (a white male) refused to comply with his employer’s instructions not to admit young black people into an arcade and was dismissed for this; *Weathersfield Ltd v Sargent* [1999] ICR 425, where the claimant (a white woman) resigned from her role at a car hire company after being told that if persons of particular race/ethnicity phoned to hire cars, she should tell them that no vehicles were available – the Court of Appeal held that this constituted discrimination on racial grounds; and *Saini v All Saints Hague Centre* [2009] IRLR 74, where an employer was found to be trying to get rid of the claimant’s manager on account of his religious belief and bullied the claimant into giving evidence against his manager – the claimant was found to have been discriminated against on the grounds of religious belief.

⁴³⁹ UKEAT/0071/09

⁴⁴⁰ This argument could also be used by those with caring responsibilities, for example, for the elderly.

defence in relation to direct discrimination⁴⁴¹. I consider the issues relating to the current test of justification below at 5.3.27.

The age discrimination argument

5.2.22 A parent who is treated less favourably as a result of his/her status as a parent (or his/her childcare responsibilities) would be able to argue that the reason for his/her treatment was related to the age of his/her child and, as such, that this was “because of” age. However, in order to even begin to argue this, the parent will need to show that there was less favourable treatment. This will necessarily entail a comparative exercise with another employee without such childcare responsibilities. Often⁴⁴² employers will not object to the fact that an employee has children (or childcare responsibilities) but instead will object to any impact that this will have on the employee’s ability to conform with the employer’s normal working arrangements. As such, any employee who, for example was unable to travel on business at short notice, required time off or was unable to work at particular times of the day would be treated equally poorly. This point was illustrated in the Employment Tribunal judgement in *Perrott v Department of Work and Pensions*⁴⁴³. The Claimant, who was the carer for her disabled sister, tried to argue that the fact that the Respondent’s special leave policy provided that, amongst other things, annual leave did not accrue during special leave amounted to unlawful discrimination. The Tribunal held that there was no less favourable treatment of the Claimant (whether on the basis of her association with her sister or otherwise) as all employees who exercised the right to special leave were treated in the same way.

5.2.23 In *Kulikaoskas v Macduff Shellfish*⁴⁴⁴ the Claimant tried to extend the concept in *Coleman v Attridge* to pregnancy. He was a man working for the same employer as his pregnant partner and had assisted his partner by lifting heavy items for her, but this had

⁴⁴¹ Section 13(2) of the EqA

⁴⁴² Although often this will be the case, there will be some examples of employers treating those with children less favourably. On Ms Coleman’s argued case, there appeared to be some evidence of direct discrimination on the basis of the fact that she had a disabled son: she had not been able to return to her role after maternity leave whereas others had and had been denied flexible working arrangements that were given to other colleagues with non-disabled children.

⁴⁴³ 1600205/2011 – there are no official reports of this case, however the judgement and a summary of the case were published on plc.com

⁴⁴⁴ [2011] I.C.R. 48

meant that he was not as productive in his own role. As such, the employer dismissed him. The case was brought under the SDA as the EqA was not in force at the relevant time. The difference between the provisions of the SDA and the EqA is that, under the SDA, sex discrimination had to be on the grounds of the Claimant's sex. In this case, the Claimant unsuccessfully tried to argue that the treatment was on the grounds of, or because of, his partner's pregnancy (which was not his own nor did it relate in any way to his sex). The EAT also threw doubt on whether the EqA would have provided him with protection, stating that this "...was not entirely clear"⁴⁴⁵.

5.2.24 The question mark over the applicability of associative discrimination to the type of fact pattern in *Kulikaoskas* could be as a result of sub-section 13(6)(b) of the EqA. This provides that "...no account is to be taken of special treatment afforded to a woman in connection with pregnancy". There will be some occasions where women do need to be treated differently as a result of their pregnancy, for example, if an employer applies a requirement which pregnant women cannot comply with as a result of their pregnancy or maternity leave⁴⁴⁶ or where a special payment is made to women on maternity leave⁴⁴⁷ (including, for example, a return to work bonus). However, it is difficult to see how the type of behaviour by the employer in *Kulikaoskas* could fall within sub-section 13(6)(b). The Claimant in *Kulikaoskas* was not seeking to argue that he should be given time off work or any other special treatment that a pregnant employee should enjoy. He was simply trying to argue that he should not be penalised for assisting his partner who was

⁴⁴⁵ As the EqA was not in force at the relevant times, these comments are *obiter* but it is interesting that the EAT believed that there was some uncertainty when the Explanatory Notes to the EqA 2010 state that "[d]irect discrimination occurs where the reason for a person being treated less favourably than another is a protected characteristic listed in section 4. This definition is broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic (for example, is disabled)." It may be that sub-section 13(6)(b) of the EqA is the reason why the EAT felt that there was any doubt about whether the EqA would prohibit the type of conduct in *Kulikaoskas* as this provides that if the Claimant is a man, then no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

⁴⁴⁶ *Caisse Nationale d'Assurance Vieillesse des Travailleurs Salaries v Thibault*, (Case 136/95) – in order to be considered for promotion an employee had to be at work for at least six months in any year – the CJEU held that this constituted direct discrimination against employees on maternity leave. As such, any maternity leave would need to be disregarded for the purposes of assessing how long an employee had been at work in order to be promoted.

⁴⁴⁷ *Abdoulaye v Regie Nationale des Usines Renault SA*⁴⁴⁷, Case 218/98, [1999] ECR I-5723 – employees who were on maternity leave received a lump sum payment in addition to ordinary remuneration – the CJEU held that this was not a breach of the equal pay principle (the male employees had complained that, as they were not entitled to maternity leave, they would never be entitled to such a payment).

pregnant. There was some connection between his treatment and the fact that he was associated with someone who was pregnant. However, the problem in proving this at an ET would be that the employer could argue that the treatment was not because Mr Kulikaoskas was associated with a pregnant woman, but because he had not met its standards in relation to productivity and that any other worker would be treated in the same way. Had he been able to show that he would have been treated differently for helping a non-pregnant worker, then the treatment would have amounted to direct discrimination, but there was no indication in the arguments presented by Mr Kulikaoskas that this was the case. As such, associative discrimination is unlikely in most cases to assist parents in securing the rights that they need to combine childcare and work because it is less likely that employers will discriminate against parents simply because they are parents but more because they have responsibilities which can be seen to impinge on their work responsibilities as a result of the norm being an unencumbered worker. That said, there may be occasional instances of direct discrimination against parents where associative discrimination might be of some use (for example, if an employer did not promote those employees who were parents simply because they were parents, rather than for any other reason).

Special treatment for pregnancy and maternity

5.2.25 The EqA prevents a man from bringing a claim on the basis of special treatment that is afforded to a woman in connection with pregnancy or childbirth⁴⁴⁸. The SDA contained similar provisions⁴⁴⁹. The purpose of this provision is relatively clear – it recognises that there will be circumstances where treating women in the same way as men would result in inequality. For example, requiring an employee to have continuously been at work for a minimum period of six months in any year in order to be promoted would disadvantage women on maternity leave⁴⁵⁰. Equally the requirement that a woman who is on maternity leave and whose post is made redundant be offered any role which amounts to suitable alternative employment in preference to other employees is an

⁴⁴⁸Sub-section 13(6)(b) of the EqA

⁴⁴⁹Sub-section 2(2) of the SDA

⁴⁵⁰ *Thibault*

example of more favourable treatment that is afforded to a woman in connection with pregnancy or childbirth.

5.2.26 In the case of *Eversheds v De Belin*⁴⁵¹, the Claimant, a man, challenged the “special treatment” that was given to his colleague, Ms Reinholz, who was on maternity leave at the time of a redundancy exercise. The selection criteria were applied whilst Ms Reinholz was on maternity leave and, as the Respondent felt that Ms Reinholz would be disadvantaged by the fact she was on leave in relation to one of the selection criteria (lock-up), it awarded her the maximum score for this criterion. The Claimant’s total score was 27; Ms Reinholz’s score was 27.5. The Claimant had received 0.5 (out of a maximum of 2) for lock up whereas Ms Reinholz had scored 2. The EAT held that the obligation to afford women with special treatment could not extend to favouring pregnant employees beyond what was reasonably necessary to compensate them for disadvantages occasioned by their condition. In this instance, the treatment that had been afforded to Ms Reinholz by the Respondent went beyond what was necessary to compensate her for the disadvantage she suffered by the lock up selection criterion being applied and therefore the Claimant had been subjected to discrimination on the basis of his sex. Arguably, however, this is wrong. The reason for the way that Ms Reinholz was treated was not because she was a woman but because she was on maternity leave. As such, a woman who had not been on maternity leave would have been treated in exactly the same way as Mr De Belin. This does not, therefore, seem to be direct discrimination.

Requirement for changes to paternity leave and paternity pay?

5.2.27 It would seem that the direct discrimination provisions might be used to launch a challenge to the current model of Additional Paternity Leave (“APL”). Under the legislation, a father is only entitled to APL where the child’s mother is entitled to maternity leave, statutory maternity pay or maternity allowance. However, a mother’s

⁴⁵¹ [2011] ICR 1137

eligibility for leave is not conditional upon the father being able to meet similar requirements.

5.2.28 As set out above, sub-section 13(6) of the EqA prevents a male employee/worker from claiming that special treatment that a woman receives as a result of her pregnancy amounts to sex discrimination. However, on the basis of *De Belin* this seems to be limited to treatment that compensates women for disadvantages occasioned by pregnancy. The question here would be whether the special treatment that a woman receives by virtue of taking Additional Maternity Leave (“**AML**”) rather than APL is designed to protect her status as a pregnant women/new mother.

5.2.29 In *Roca Alvarez*, the CJEU held that there was sex discrimination where a father was only entitled to take leave if the child’s mother was employed, but the mother’s entitlement to this parental leave was not conditional on the father’s employment status. The leave that the Claimant was trying to take was a form of parental leave which had originally been designed to encourage and facilitate breastfeeding, but which had changed over time such that its purpose was to allow either parent to spend time with his/her new child. As such, there was no way in which this could amount to leave that was need to protect a woman’s biological condition. However, the situation is far from clear cut. Whilst the CJEU made helpful comments in the *Roca Alvarez* case acknowledging the importance of both parents' roles in caring for a child (for example “...the positions of a male and female worker, mother and father of a young child are comparable with regard to their possible need...to look after the child”⁴⁵²), it adopted an apparently contradictory position in the case of *Betriu Montull* case (discussed in 3.4.5) and again reverted to the mantra of women having a special relationship with a newborn baby. There is no substantive consideration of the decision in *Roca Alvarez* or the arguments which led the CJEU (that because the purpose of “breastfeeding” leave had become decoupled from its original purpose of protecting a woman's unique biological ability, leave could no longer be provided only to women) yet similar arguments would

⁴⁵² Paragraph 24 of the decision

seem to apply in Mr Betriu Montull's situation. If his wife had been eligible for maternity benefits, then she could have chosen to transfer these to him, other than the compulsory period of maternity leave which was for the purpose of allowing her to recover from childbirth (thereby ensuring her health and safety). The benefits provided were not, therefore, solely for the benefit of women, they could be transferred to fathers in certain circumstances.

5.2.30 Although maternity leave was originally designed to allow women to combine their responsibilities as a mother with their work responsibilities (by allowing them time out of the workplace to have a child), with the introduction of APL and the transferability of AML to a father, the leave has become detached from its original purpose and now is designed simply to allow a parent (irrespective of their sex) to take time off to care for a child. As such, applying the decision in *De Belin*, sub-section 13(6) of the EqA should not apply in these circumstances. Arguments similar to the above were considered by the Employment Tribunal in *Shuter v Ford Motor Company*⁴⁵³. There the Tribunal found that there was no direct discrimination because it found that the appropriate comparator was a woman wishing to take APL (in her capacity as the partner of the child's mother) as opposed to a woman seeking to take AML. There was, therefore, no less favourable treatment because a woman in the same circumstances would be treated in the same way.

5.2.31 This is only a first instance decision, so it will not be binding on any future consideration of the issues. There is an argument that the Tribunal in *Shuter* was wrong on the comparator issue. Section 23(1) of the EqA provides some guidance as to how to determine who is the appropriate comparator (who may be real or hypothetical) – it provides that there must be no material difference between the circumstances of the claimant and the comparator. The case law suggests that there is no need for the comparator to be a clone of the claimant in every respect⁴⁵⁴ so there can be some differences between the circumstances of the comparator and the claimant. The key issue here would be whether the label attached to the type of leave (that is, that it was AML as

⁴⁵³ ET/3203504/13

⁴⁵⁴ *Madden v Preferred Technical Group CHA Limited* [2005] IRLR 46

opposed to APL) means that the comparator's circumstances are materially different from a claimant who is exercising his right to APL. Arguably the distinction between APL and AML is a discriminatory characteristic (on the basis that men can never take AML, but both men and women can take APL). In *James v Eastleigh*⁴⁵⁵, the House of Lords suggested that circumstances should not be ascribed to a comparator if those circumstances were discriminatory. There is a slight difference between the situation in *James* where the issue was that those over retirement age, which was itself a discriminatory criteria, were entitled to free admittance but those below it were not, given that retirement ages were different for men and for women. However, on the basis of the fact that, as set out above, the AML provisions could be argued to go further than is necessary to alleviate the disadvantages suffered by virtue of pregnancy, this can be seen as a discriminatory characteristic and therefore should be discounted. On this basis, the appropriate comparator would be a woman exercising her right to AML.

5.2.32 As the argument above is based on comparing a father on APL with a mother on AML, there is a further limitation to it. Many employers that offer enhanced maternity pay will offer this only for a limited period of time, rather than for the full duration of the maternity leave. As such, if an employer was to offer enhanced maternity leave for a period of six months or less (this being the duration of the OML period), no enhanced payment would be made during the AML period and thus this would not secure any additional right to payment for a father taking APL. It should be noted that the Government consultation paper that was published prior to the introduction of APL suggested that the new APL provisions would not result in an obligation on employers to offer enhanced paternity pay where enhanced maternity pay was offered to female employees. For the reasons set out above, this advice would seem to be questionable.

5.2.33 Whilst the type of challenge described above might have the effect of increasing the amount of time that men take off to care for their children, there is a risk that it might have an unintended negative effect on working mothers. Employers might decide that a

⁴⁵⁵ [1990] 1 QB 61

ruling that they were required to offer enhanced paternity pay would increase their costs significantly and, if they wished to avoid this increased cost, might reduce (or eliminate altogether) their enhanced maternity pay. This would clearly have a negative impact on the individual women who worked for that organisation and who were on (or who planned to go on) maternity leave since they would no longer receive enhanced maternity pay. Where enhanced/occupational maternity pay is a contractual entitlement, this may be a future problem, however, where this is expressed to be non-contractual or discretionary, employers might seek to withdraw immediately. (There would, of course, in these circumstances be the possibility for an employee to challenge the designation of “non-contractual” or “discretionary” on the basis that the payment had become a contractual term as a result of the custom and practice of the employer.) This is a problem with the assimilation model: there is nothing to prevent an employer removing a right that currently benefits one group so that assimilation is not necessary.

Conclusion on direct discrimination

5.2.34 For the reasons set out above, the provisions on direct discrimination have limited scope for assisting parents in the workplace; however, what has been identified is that often the issue is around a neutral practice (which applies to all employees) which disadvantages working parents (or more usually working mothers).

5.3 Indirect Discrimination

5.3.1 As identified above, parents often face problems in trying to combine their family responsibilities with their employer’s working practices, for example, because the employer’s “usual” working day affects their ability to collect their children from school/childcare. Protection against direct discrimination is less useful in this context as it only outlaws those practices which apply solely to one sex (usually women). Indirect discrimination essentially makes those practices that disadvantage groups defined by reference to one or more relevant protected characteristics (these are: age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and

sexual orientation), unlawful unless the relevant practice can be justified. Under the EqA, there is unlawful indirect discrimination where:

- B (in the employment context, an employee, worker or applicant) has a relevant protected characteristic.
- A (in the employment context, an employer) applies to B a provision, criterion or practice (“PCP”).
- A also applies (or would apply) that PCP to persons who do not share B's protected characteristic.
- The PCP puts or would put persons with whom B shares the protected characteristic at a particular disadvantage compared to others.
- The PCP puts or would put B at that disadvantage.
- A cannot show the PCP to be a proportionate means of achieving a legitimate aim.

5.3.2 I consider below the various elements of the test for indirect discrimination and the extent to which they may be of use in securing the rights that parents need to successfully combine work and family.

PCP

5.3.3 In order to show indirect discrimination, a claimant must first show that a PCP was applied to him/her. However, to fully understand what this means, it is necessarily to take a step back and consider what preceded the requirement for a PCP. The previous test required a claimant to show that a 'requirement or condition' had been applied.

5.3.4 The terminology “condition or requirement” was thought to be a bigger hurdle than “PCP” as a result of *Perera v Civil Service Commission*⁴⁵⁶, however, as set out below, it is not clear that it necessarily needed to be. In *Perera* the Court of Appeal interpreted “condition or requirement” as not including a mere preference⁴⁵⁷. This was a departure

⁴⁵⁶ [1983] ICR 428

⁴⁵⁷ The case involved a claimant who was applying for a role where the selection criteria included the following preference: “candidates with a good command of English language, experience in the UK and with

from the approach that the courts had previously adopted in relation to this issue⁴⁵⁸. The approach in *Perera* proved to be particularly problematic in the context of indirect sex discrimination claims brought by women whose requests to work part-time had been refused. In *Enderby v Frenchay Health Authority*⁴⁵⁹ the CJEU appeared to suggest that the UK's definition of indirect discrimination, in particular the limitations of the "condition or requirement" test imposed by *Perera*, breached EU law. This problem was rectified by the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, by which GB implemented the European Burden of Proof Directive⁴⁶⁰. The Regulations adopted the "PCP" test set out in the Directive. The change from "condition or requirement" to "PCP" was felt to be a welcome one, which represented "arguably a more flexible approach"⁴⁶¹. However, it is far from clear that the interpretation of "condition or requirement" in the cases of *Perera* and *Clymo* was correct. As Michael Connolly has noted in relation to the former there was no particular reason why the Court of Appeal could not have held that there was a "requirement" to have a good command of English and that the Australian courts, when considering similarly worded legislation "took a purposive approach and refused to follow *Perera*"⁴⁶². He also noted that "[n]o distinction between 'absolute bar' and a 'mere preference' has ever entered the jurisprudence of the CJEU, the American courts ..., or the Canadian courts..."⁴⁶³.

5.3.5 Even if PCP is a lesser test than that of "condition or requirement", there still seems to be no reason why there is a need for a PCP (or a condition or requirement) at all. This additional hurdle seems to narrow the scope of the legislative protection more than is necessary. There would seem to be no reason why any action (whether it is a PCP or not) that an employer undertakes in relation to its employees that has a disparate impact

British nationality would be an advantage". The Claimant argued that this amounted to indirect race discrimination on the basis that non-British nationals would be at a disadvantage.

⁴⁵⁸ For example, *Watches of Switzerland v. Savell* [1983] IRLR 141

⁴⁵⁹ C-127/92,

⁴⁶⁰ Council Directive of 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex

⁴⁶¹ Isabel Manley Ba Llm "The Burden of Proof in Discrimination Law – the United Kingdom Experience", 23 *Indus LJ (Juta)* 1156 (2002)

⁴⁶² Michael Connolly, "The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (SI 2001 No 2260)", *I.L.J.* 2001, 30(4), 375-380, 378

⁴⁶³ *ibid*

on those with a particular protected characteristic and which cannot be justified should not amount to indirect discrimination. The PCP approach is set out in EU law: article 2 of the Equal Treatment Directive⁴⁶⁴ includes a definition of indirect discrimination which includes the term PCP.

5.3.6 Whilst the definition of PCP is relatively wide, some actions by employers will fall outside the definition and can never amount to indirect discrimination. In *Nottingham City Transport Ltd v Mr A Harvey*⁴⁶⁵, for example, the EAT held that a one-off flawed disciplinary process could not be said to amount to or involve the application of a PCP. In this instance the Claimant had conceded at the Employment Tribunal that the flawed disciplinary process could not be a provision or a criterion, so the remaining question was whether this could amount to a practice. The EAT held that it could not on the basis that for something to be a practice it must have an element of repetition. In considering the claim, the EAT commented that it is not sufficient merely to identify that an employee has been disadvantaged and that they would not have been so disadvantaged if they did not have the relevant protected characteristic; a PCP must have been applied.

5.3.7 It would seem that not all unfair treatment involves the application of a PCP. However, what is not clear (either from this case or the legislation itself) is why there is a requirement for a PCP in order to show indirect discrimination.

Disadvantage

5.3.8 In order to show indirect discrimination a claimant will have to show that the employer's PCP puts or would put persons with whom the claimant shares the protected characteristic at a particular disadvantage compared to others. This inevitably involves a comparison between those with the particular protected characteristic and those without. The starting point for this exercise is to look at the impact of the PCP on a particular pool of individuals. Before considering the current position under the EqA, it may be helpful to understand how the concept of disadvantage has developed. The original definition of

⁴⁶⁴ Directive 2006/54/EC

⁴⁶⁵ EAT/0032/12

indirect sex discrimination included a requirement that the claimant show that the “condition or requirement” applied to her was to her detriment because *she could not comply with it*. The requirement to show that a claimant could not comply with a particular condition or requirement was not initially a problem for claimants because of the way in which this was dealt with by the courts.

5.3.9 In *Price v Civil Service Commission*⁴⁶⁶ the EAT held that “can comply” should not be narrowly construed to mean theoretically possible, but that the ET should have considered whether it was possible to comply with the condition or requirement in practice. In the subsequent case of *Mandla (Sewa Singh) v. Dowell Lee*⁴⁶⁷ the House of Lords held that “can comply” does not mean “can physically” comply, but means that the individual “can comply consistently with the customs and cultural conditions of the racial group”. This approach was also adopted in *Commission for Racial Equality v Dutton*⁴⁶⁸.

5.3.10 The need to show that a claimant could not comply with a particular condition or requirement became a significant hurdle for claimants trying to challenge decisions not to allow part-time working following the case of *Clymo v Wandsworth Borough Council*⁴⁶⁹. There an ET had held that the Claimant had not shown that she could not comply with the requirement to work full-time as she had access to childminding services, she and her husband were earning over £24,000 per year and the childminding would be required only for three days per week. The ET further held that the fact that the fact that the Claimant wanted to be able to care for her child herself, or for her husband to be able to do so, was a “personal preference”. This approach to the issue of “cannot comply” is difficult for any parent who theoretically can afford and has access to some form of childcare (irrespective of the fact that the parent may feel it is beneficial for them or their partner to be the primary care-giver).

⁴⁶⁶ [1977] 1 W.L.R. 1417

⁴⁶⁷ [1983] 2 A.C. 548

⁴⁶⁸ [1989] Q.B. 783

⁴⁶⁹ [1989] IRLR 241

5.3.11 However, the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001⁴⁷⁰ amended the definition of indirect discrimination in the SDA, including by removing of the requirement that the claimant needed to show that the PCP was to her detriment *because she could not comply with it*. At the time, it was felt that the removal of the “cannot comply” requirement would widen the scope for part-time working claims.

5.3.12 JL Atkinson has suggested that the change in the wording of the indirect discrimination test did not alleviate the difficulties facing claimants. He suggests that the old requirement of ‘can comply’ “...is implicitly referred to in the case of *Sinclair Roche & Temperley v. Heard and another*⁴⁷¹, which went to the EAT. ... The EAT criticised the tribunal’s conclusion that it was indisputable that substantially more women than men would be disadvantaged by a requirement to work full-time given women’s greater provision of childcare, as the context of the case concerned ‘men and women solicitors or men and women working in high-powered and highly paid jobs in the City’⁴⁷². Its implicit assumption is that women who are high-earners can afford childcare and are thus able to work full-time”⁴⁷³.

5.3.13 Looking now at the current test under the EqA and the issue of “disadvantage”; there is no definition of this term in the EqA. The Equality Act 2010: Statutory Code of Practice – Employment⁴⁷⁴ (the “**Code**”) provides guidance on the interpretation of the relevant provisions in the EqA. This states that disadvantage could include the “...denial of an opportunity or choice, deterrence, rejection or exclusion”⁴⁷⁵.

5.3.14 Disadvantage replaced the concept of disparate impact, on which there was much case law about how great the disparity had to be in order for a claimant to be successful in a claim of indirect discrimination. In most cases since the modification to the test, it

⁴⁷⁰ SI 2001/2660

⁴⁷¹ [2004] IRLR 763

⁴⁷² *ibid*, 773

⁴⁷³ J Atkinson, “Does the Sex Discrimination Act provide a right to work part-time for mothers?”, *Journal of Social Welfare and Family Law*, 32:1, 47-57,

⁴⁷⁴ EHRC ‘The Equality Act 2010: Statutory Code of Practice – Employment’ (2011)

⁴⁷⁵ *ibid*, p61

seems that the focus has been on establishing what caused the disadvantage⁴⁷⁶, rather than whether there was any disadvantage. However, in the cases below, the issue of what might constitute disadvantage was considered. In *Eweida v British Airways*⁴⁷⁷, a case regarding religious discrimination, the EAT suggested that a claimant might be able to show disadvantage if s/he had reluctantly complied with a PCP in order to avoid losing his/her job. (The Claimant was ultimately unsuccessful in her claim when it reached the Court of Appeal⁴⁷⁸ because she was unable to show that there was group disadvantage, but there was no suggestion that the Claimant had not suffered a disadvantage.) This is exactly the type of scenario which could affect parents. A parent might want to work part-time and so submit a request for flexible working which is declined by the employer. In these circumstances, the parent might continue to work because she needs to, but might seek to bring a claim to try to force the employer to reconsider. The case of *Hacking & Paterson, Hacking & Paterson Management Services Ltd v Mrs L M Wilson*⁴⁷⁹ might be problematic in this regard. In this case Lady Smith noted that - "...[w]here the effect is on an employee who is able to work full time but does not wish to do so, it is difficult to see that it would be correct to talk in terms of that employee being disadvantaged." However, the *Hacking* case is contrary to many of the cases on this subject and it would seem that this case is likely to have been wrongly decided⁴⁸⁰. There are also currently no reported appellate decisions that have considered this case though the decision in *Hacking & Paterson* was considered in the ET case of *Cooper v House of Fraser (Stores) Ltd*⁴⁸¹. This was also a case about a woman who wished to work part-time in circumstances where she could have found full-time childcare. By contrast with *Hacking*, an ET found that there was a disadvantage; it was reasonable for the Claimant to believe that it was inappropriate for her child to be in someone else's care for such a long period of time.

⁴⁷⁶ For example in *Homer v Chief Constable of West Yorkshire* [2012] UKSC 15, the issue was not whether there was any disadvantage to the Claimant but rather whether this was caused by his age or the fact that he was approaching retirement (and whether the latter could be distinguished from age).

⁴⁷⁷ [2009] ICR 303

⁴⁷⁸ [2010] EWCA Civ 80

⁴⁷⁹ UKEATS/0054/09

⁴⁸⁰ Contrast this with the approach, for example, in *De Souza* (discussed above) where the Court of Appeal opted for a wide definition of disadvantage

⁴⁸¹ [2012] EqLR 991

Pools

5.3.15 Not only must there be a disadvantage but that disadvantage must be shared by other persons with whom the claimant shares the protected characteristic. ETs can use a variety of methods to determine whether there has been any group disadvantage. This includes using their general knowledge in determining whether a PCP will affect a group with the relevant protected characteristic, using expert evidence to determine the impact on a group with the relevant protected characteristic, and doing a statistical analysis of the “pool”.

5.3.16 As set out above, in order to bring a successful indirect sex discrimination claim, a claimant will need to show that the PCP puts or would put persons with whom the claimant shares the protected characteristic (here, sex) at a particular disadvantage compared to others. As has been identified in the preceding chapters, women tend to have primary responsibility for childcare. This means that, subject to the issues set out in this chapter, it should be possible for them to establish that a PCP which impacts on their ability to care for a child (for example, a requirement to work full-time) puts women at a particular disadvantage compared to men. However, it also means that it is likely to be significantly more difficult for men to be able to show the group disadvantage necessary to succeed in an indirect discrimination claim. This is where a combination of direct and indirect discrimination may be helpful – to the extent that a female employee is able to show that a provision is indirectly discriminatory, an employer could not disapply this provision only from women (on the basis that this would amount to direct discrimination). As such, if a mother is successful in a claim of indirect discrimination, which results in the employer changing its policy, this can benefit not only mothers, but also fathers.

5.3.17 The composition of the pool is a critical issue and the selection of the pool can determine that outcome of a case: a very wide pool can mean that it is more difficult to establish disadvantage to the group with a particular protected characteristic

5.3.18 The case law has demonstrated that the pool should include only those people who are affected or potentially affected by the PCP – people with no interest in the advantage or disadvantage/working practice should not be included⁴⁸². There are cases where the pool might consist of the entire workforce (for example if an employer is introducing a new practice that will affect everyone, as with the new roster system that was introduced in *London Underground v Edwards*⁴⁸³, or imposing a requirement that only those who provide full time services will be employed, with all others being terminated and re-engaged through a third party, as in *Allonby v Accrington and Rossendale College*⁴⁸⁴). In other cases it will consist in a smaller section of the workforce. However, this does not mean that only those who are adversely affected by the PCP should be in the pool. The ET made this mistake in *London Underground v Edwards* (which was overturned on appeal) and held, in a case involving the imposition of a new roster on all staff which had a negative impact only on single parents, that the pool consisted single parent train operators. On appeal, this approach was held to be wrong; all employees were affected by the new roster, so the correct pool was the entire workforce.

5.3.19 In *Secretary of State for Trade and Industry v Rutherford (No 2)*⁴⁸⁵ the House of Lords suggested that, in most cases, it would be appropriate to look at which individuals in the pool could comply with the PCP, rather than those who could not. However, it did not rule out the possibility that in some cases, the disadvantage-led approach might be appropriate.

5.3.20 An ET has a great deal of discretion in determining the pool – and more generally in relation to its approach to discrimination claims. In *Shamoon* Lord Nicholls of Birkenhead noted that “[t]he most convenient and appropriate way to tackle the issues

⁴⁸² For example, where the PCP relates to recruitment, then the pool might be all those that would be suitable for the role but for the PCP (as in *University of Manchester v Jones* [1993] ICR 474 in relation to an advertised role of careers adviser, which was open to those aged between 27 and 35 (the age requirement constituting a PCP); where the PCP relates to a benefit that an employer provides, then the pool might be all those that are eligible for the benefit but for the PCP (as in *Allonby v Accrington & Rossendale College and Others* [2001] 2 CMLR 27); where the PCP relates to a requirement that is imposed by the employer, then the pool might be those who are affected by the requirement (as in *Hacking & Paterson, Hacking & Paterson Management Services Ltd v Mrs L M Wilson* UKEATS/0054/09)

⁴⁸³ [1999] ICR 494

⁴⁸⁴ [2001] 2 CMLR 27

⁴⁸⁵ [2006] UKHL 19

arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case”⁴⁸⁶. Similarly in *Grundy v British Airways*⁴⁸⁷ Lord Justice Sedley noted that “... one of the striking things about both the race and sex discrimination legislation is that, contrary to early expectations, three decades of litigation have failed to produce any universal formula for locating the correct pool, driving courts and tribunals alike to the conclusion that there is none.”

5.3.21 In the childcare/parenting context, most ETs seem to accept that any provision which affects those working on a part-time basis only will place women at a disadvantage given their childcare responsibilities – but there are also occasional decisions showing that this approach is not followed in every case. For example, in *Kidd v D.R.G. (UK) Ltd*⁴⁸⁸ the EAT noted (in 1985) that the tribunal “...did not regard it as appropriate any longer, given the changing conditions of modern life, to assume that when opportunities of full-time employment have to be given up for the sake of providing home care for young children, the burden still falls to any considerable extent more heavily upon women than upon men”. A similar approach to that in *Kidd* was adopted in *Hacking & Paterson, Hacking & Paterson Management Services Ltd v Mrs L M Wilson*⁴⁸⁹ (described further below) – however, between these two cases there were a number of cases that did not follow the approach of *Kidd*. In *British Airways Plc v Starmar*⁴⁹⁰ the EAT held that statistics in relation to the workplace in question were not of particular use in this case and felt able to rely on generalised statistics which showed that women were more likely than men to work part-time and a survey by the Equal Opportunities Commission which evidenced the fact that women tend to choose part-time working in order to accommodate their childcare responsibilities. Similarly in *Aviance UK Ltd v Mrs M L Garcia-Bello*⁴⁹¹ the EAT held that ETs should be able to use not only statistical information, but also their intrinsic knowledge – in this case, the fact that women were more likely to be the primary carers

⁴⁸⁶ Paragraph 12

⁴⁸⁷ [2007] EWCA Civ 1020

⁴⁸⁸ [1985] ICR 405

⁴⁸⁹ UKEATS/0054/09

⁴⁹⁰ EAT/0306/05/SM

⁴⁹¹ UKEAT/0044/07/DA

of children and so less likely to be able to meet the employer's requirement to work different hours on different days of the week.

5.3.22 In *Hacking* Lady Smith was reluctant to accept that women would inevitably be disproportionately adversely affected by a refusal to grant flexible working. However the approach in *Kidd* and in *Hacking* does not seem to have been widely followed. In *Cooper v House of Fraser (Stores) Ltd*⁴⁹², in which an ET considered the decision in *Hacking & Paterson*, it went on to conclude "...both from statistics and from our own observations of how society operates, that it is still women who in the main have the burden of the care of very young children."

5.3.23 The difficulty for claimants is the fact that they will not know whether the particular ET that will hear their case will take the view that provisions affecting part-time workers will place women at a disadvantage given their childcare responsibilities or whether they will need to adduce evidence of this. Clearly the safest course for any claimant would be to be ready to provide the relevant evidence, however, it can be difficult to do so and, in most cases, the evidence that is required can only be determined once the pool is known.

5.3.24 Taking the last of these issues first, the case of *Kidd v Drg* provides a helpful illustration of the difficulties in determining the pool. In *Kidd* there was a redundancy situation such that the Respondent needed to reduce the number of its employees in its clean rooms. It decided to do so by first selecting those who worked part-time. Mrs Kidd, who was one of the part-time workers made redundant, brought an indirect discrimination claim on grounds of marital status or sex. She argued that the pool should consist of the whole population; the Respondent argued that it should include only those who worked in the clean rooms of the Respondent (who were those directly affected by the redundancy decision). The ET chose an entirely different pool: those with a need to provide home care for children to an extent that would normally be incompatible with

⁴⁹² [2012] EqLR 991

full-time employment. Whilst the Claimant may have come armed with evidence to support her pool or perhaps even that of the Respondent, it would seem impossible for her to have been able to present evidence on a pool which neither party had proposed. It is also unclear how the Claimant could have obtained the required evidence on this pool; no publicly available statistics are compiled on this group of individuals.

5.3.25 Showing group disadvantage may become more difficult in relation to childcare difficulties if men start to take on greater responsibilities in this regard. Women will have to provide figures showing that they are still disadvantaged by PCPs incompatible with the provision of childcare, which may prove difficult. The impact of this could be substantial. If women are no longer able to rely on indirect sex discrimination to provide them with substantive rights to enable them to combine work and family, then they will need to fall back on the leave rights outlined earlier in this thesis. These are often inadequate and do not fully address the types of issues that working parents face, particularly regarding the availability of flexible working. Without effective rights guaranteeing parents equality with other workers, there is a real risk that working parents will find themselves side-lined with no legal recourse. This illustrates the fact that there is a real problem with trying to fit the childcare/parenting issue into the sex discrimination provisions; whilst originally the childcare issue may have been largely confined to women it no longer is and, as such, needs additional protection outside the sex discrimination sphere.

5.3.26 The selection of the pool is a critical issue in any discrimination claim yet, from the analysis above, it is apparent that there are no clear principles to determine which pool is appropriate in any given case. As noted by the Court of Appeal in *Grundy*, Tribunals "...have no principle which tells them what is a legally correct or defensible pool"⁴⁹³. However, neither do claimants or respondents, which makes bringing or defending a case very difficult. There is one potential glimmer of hope for parents who are looking to bring indirect discrimination claims on the basis of childcare

⁴⁹³ Paragraph 30 of the judgment

responsibilities. Comments made in *Homer v Chief Constable of West Yorkshire*⁴⁹⁴ suggest that there may be circumstances in which ETs may be able to effectively ignore the pool question. The Supreme Court there noted that the new formulation of the concept of indirect discrimination "...was intended to do away with the need for statistical comparisons where no statistics might exist"⁴⁹⁵. This was relied on by a Tribunal in *Crosse-Scrutton v Atos IT Services UK Ltd*⁴⁹⁶ which accepted that women are disadvantaged because they tend to take primary responsibility for childcare. However, as identified above, this does little to help fathers who are disadvantaged in the workplace and, given the wide discretion of an ET in relation to the pool question, there is no guarantee that any ET will follow the same approach as adopted in *Crosse-Scrutton*.

Justification

5.3.27 Unlike direct discrimination (other than age discrimination), indirect discrimination can be justified; why is this? Monaghan and Gill suggest that the reason for allowing justification in relation to indirect discrimination is the fact that indirect discrimination is not treatment which is aimed at a particular section of society based on their personal characteristics (which direct discrimination is) but is instead treatment which incidentally adversely affects the particular section of society by reason of those characteristics⁴⁹⁷. This seems to be a sensible and pragmatic reason for differentiating between direct and indirect discrimination. Employers operate as economic entities, rather than social entities existing solely to provide jobs. There are some business decisions which will result in a disparate impact on those with protected characteristics (in circumstances where that impact is not intentional but arises because of neutral treatment) but which are made as a result of a genuine business need. Underpinning the indirect discrimination legislation appears to be a recognition of the need to balance the interests of the employer, as an economic entity, with the interests of the employee. This

⁴⁹⁴ [2012] IRLR 601

⁴⁹⁵ [2012] UKSC 15

⁴⁹⁶ [2012] EqLR 840

⁴⁹⁷ Tess Gill and Karon Monaghan, "Justification in direct sex discrimination law: taboo", *I.L.J.* 2003, 32(2), 115-122

concept, of itself, does not seem to be particularly controversial. The issue arises as to how to strike the balance and the test that should be applied.

5.3.28 The key case in the CJEU in relation to the test to be applied in respect of justification is *Bilka-Kaufhaus GmbH v Weber von Hartz*⁴⁹⁸. Here it was held that the tests to be applied were (i) whether the PCP met a genuine need of the enterprise, (ii) whether it was suitable for attaining the objective pursued and (iii) whether it was necessary for that purpose. The emphasis on “genuine” or “real” need of the employer is important – as a matter of principle an employer should only be able to apply a discriminatory requirement or condition (which was the test at the relevant time, but has now changed to PCP) where it needs to do so, rather than just because it would be helpful or convenient. The requirement that the PCP be necessary for achieving the aim is also important – because without this requirement, an employer might be able to show a perfectly legitimate aim (for example, needing to reduce headcount) but the means used to achieve that aim might go beyond what is necessary to achieve that aim (for example, making those who are part-time redundant in preference to those who are full-time⁴⁹⁹).

Genuine need

5.3.29 It is of note that the requirement for a “genuine” or “real” need is not reflected in the EqA, which provides that indirect discrimination can be justified if the employer can show that it is a “proportionate means of achieving a legitimate aim.”⁵⁰⁰ However, this does not necessarily mean that the test applied under UK law is any different, particularly as UK law must be interpreted in accordance with European law wherever reasonably possible⁵⁰¹.

⁴⁹⁸ [1986] E.C.R. 1607

⁴⁹⁹ This situation arose in the case of *Kidd v Drg (UK) Limited* [1985] ICR 405, a case heard before the decision in *Bilka Kaufhaus*. Here the employer decided to make part-time workers redundant in preference to full-time workers because the employer could gain certain “marginal advantages”. The EAT held that this decision was justified, particularly as it was an all-female workforce and therefore no man could be advantaged by the practice (which meant that the practice was “capable of being justified on the slightest grounds”). Arguably the decision would have been different had it been heard after *Bilka-Kaufhaus*.

⁵⁰⁰ s19(2)(d) EqA

⁵⁰¹ By way of example, in *Homer v Chief Constable of West Yorkshire Police* [case ref], the [] held that although UK law refers to the employer showing that the PCP is a proportionate means of achieving a legitimate aim, this had to be read in light of EU requirements.

5.3.30 GB cases following *Bilka-Kaufhaus* referred to the question for ETs/the courts being whether the PCP served a real need. In *Hampson v Department of Education and Science*⁵⁰², the Court of Appeal noted that for a condition or requirement to meet a real need it must fall “...somewhere between being necessary and being merely convenient.”⁵⁰³ (It should be noted that the test at issue was whether the “condition or requirement” was justified, however, the change in terminology to “PCP” is not material to the justification question). What will be a “real need” will depend on the facts of a particular case, but the following have been found to be sufficient: a need to save money and introduce budgetary control (*Allonby*), to reward those employees who work nights (*Chief Constable of West Midlands v Blackburn*⁵⁰⁴) and to manage the risk of undue influence or favouritism, or the perception of the same (in relation to a policy that those in a relationship should not work together as manager/subordinate – *Faulkner v Chief Constable of Hampshire*⁵⁰⁵).

5.3.31 Historically there was also a problem with the requirement to show a “real” need. In *Barry v Midland Bank*⁵⁰⁶ the House of Lords held that an employer’s aim in applying a requirement or condition (as the law then required) only had to be legitimate. This was a far lower hurdle for an employer to overcome than the “real” need test. An employer would, for example, have been able to show that it would be more convenient to adopt a particular PCP under the test in *Barry*. This was rectified in *Allonby* where the Court of Appeal held that there had to be a “real” need for a requirement or condition (as the law then required) to be applied – a sound objective business reason alone was not sufficient. However, it is interesting that this interpretation was only adopted after a reference to the CJEU.

5.3.32 It is clear from CJEU case law that the real need cannot be just about saving costs⁵⁰⁷. However, costs together with another rationale (the costs-plus approach) can

⁵⁰² [1989] I.C.R. 179 at [485]

⁵⁰³ *Hampson v. Department of Education and Science*

⁵⁰⁴ [2008] ICR 505

⁵⁰⁵ UKEAT/0505/05

⁵⁰⁶ [1999] 1 WLR 1465

⁵⁰⁷ *De Weerd v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen* (C-343/92), [1994] ECR I-571, *Kutz Bauer v Freie und Hansestadt Hamburg* (C-187/00), [2003] ECR I-2741

amount to a sufficient justification of a prima facie case of discrimination. As can be seen from *Woodcock v Primary Care Trust*,⁵⁰⁸ the distinction between a cost only and a cost-plus justification may not be entirely clear. It is for this reason that Lane has expressed concern that this decision "... may now encourage employers, wishing to save costs, to find some other, additional 'justification' for what would otherwise be an unlawful act of discrimination"⁵⁰⁹. As set out further below, this concern seems to be warranted, particularly as the Court of Appeal gave no guidance on what would be sufficient to show the "plus" element in a costs-plus justification.

5.3.33 *Woodcock* was a case concerning the justification of direct age discrimination (as set out above at 5.2.21, the age discrimination provisions are unusual as even direct discrimination is capable of justification). The Respondent underwent a reorganisation which resulted in the Claimant being put at risk of redundancy. The Claimant was entitled to enhanced retirement benefits if he remained employed at 50 and had notice period of a year. The Claimant's role ceased to exist and he was given an interim role to enable him to look for suitable alternative employment. The Respondent tried to arrange a redundancy consultation meeting but was unable to do so prior to the Claimant's 49th birthday. As such, it terminated his employment, on notice, prior to any formal redundancy meeting taking place. The ET found that there was a prima facie case of age discrimination: the only reason for the timing of the dismissal notice was the Claimant's age, but held that this was objectively justified. The legitimate aim of the Respondent was to give effect to the Respondent's decision to terminate the Claimant's employment by reason of redundancy as well as saving significant costs for the Respondent (on the basis that the enhanced retirement benefits would not be payable).

5.3.34 The Court of Appeal noted the artificiality of the costs plus approach, quoting Mr Justice Elias in *Redcar v Cleveland Borough Council*⁵¹⁰ ("Almost every decision taken by an employer is going to have regard to costs."). However to a degree, the Court of Appeal

⁵⁰⁸ [2012] EWCA Civ 330

⁵⁰⁹ Jackie Lane "Woodcock v Cumbria Primary Care Trust: The Objective Justification Test for Age Discrimination", *The Modern Law Review*, Vol 76 (January 2013), pp146-157

⁵¹⁰ [2008] ICR 249

dodged the question by finding that this was a case where there was a “costs plus” rationale. The types of PCP that are likely to disadvantage parents relate to working hours, place of work and the need for time off. The costs associated with these is likely to be relatively low and it would seem difficult, in most situations, for an employer to be able to rely solely on costs to objectively justify a potentially discriminatory PCP. As such, this rule would only be problematic for parents if the courts were not to take a robust approach to proportionality.

Proportionality

5.3.35 Proportionality encompasses the second and third strands of the test under *Bilka-Kaufhaus*: whether the PCP is suitable for attaining the objective pursued and whether it is necessary for that purpose.

5.3.36 Historically, GB law seemed to enable employers to, relatively easily, justify a *prima facie* case of indirect discrimination. As such, Watson⁵¹¹ suggested in 1995 that any derogation arising from the principle of non-discrimination based on nationality between workers of the Member States in the sphere of employment seemed to be more tightly controlled than any derogation from the principle of non-discrimination on the basis of sex (i.e. the justification defence). As set out below, CJEU and UK case law now takes a far more robust approach to justification than previously so this critique would seem no longer to be appropriate.

5.3.37 In *Dansk Jurist- og Økonomforbund v Indenrigs- og Sundhedsministeriet*⁵¹² the CJEU rejected the objective justification offered by the Respondent on the basis that “... the legitimate objectives pursued by the legislation at issue in the main proceedings may be attained by less restrictive, but equally appropriate, measures...”⁵¹³ and finding that the PCP went “beyond what is necessary to ensure the objectives pursued.” The Attorney General’s opinion in this case echoed this sentiment, noting that “[a] measure is

⁵¹¹ Philippa Watson “Equality of Treatment: A Variable Concept?” *ILJ* 1995, 24(1), 33-48

⁵¹² (Case C-546/11) [2014] 1 C.M.L.R. 41

⁵¹³ Paragraph 69 of the judgment

“necessary” where the legitimate aim pursued cannot be achieved by an equally suitable but more benign means”⁵¹⁴.

5.3.38 This interpretation is concerning and has led Bell to suggest that GB legislation “...is less clear in conveying the 'necessity' requirement contained within the Directive; that is, there must be **no** suitable alternative means that could achieve the same aim without having the discriminatory effect” (my emphasis added)⁵¹⁵. This is a fair criticism; in many of the reported decisions on indirect discrimination, there appears to have been no consideration of whether there was an alternative way to achieve aim at which the respondent’s stated PCP is supposed to achieve. *Barry v Midland Bank* is often cited as demonstrating that, for an employer to show that its actions are proportionate, it does not need to show that it had no alternative course of action but only that the PCP was “reasonably necessary” in order to achieve a legitimate aim. This encompasses two separate issues (i) whether the PCP serves a real need and (ii) whether the PCP is reasonably necessary to achieve that real need. The Respondent operated an enhanced redundancy payment scheme which was based upon an employee's salary on the date on which his/her employment terminated and number of years' service. At the time of the Claimant's redundancy she was employed on a part-time basis. She had previously also been employed on a full-time basis. The Claimant sought to argue that the redundancy payment scheme amounted to indirect sex discrimination in that it disadvantaged those who had done some period of full-time work but subsequently changed to part-time hours, and that this group would comprise a greater number of women than men due to caring responsibilities falling predominantly on women. The Claimant argued that there was an alternative, less discriminatory way of calculating her redundancy payment so that it reflected her full-time, as well as her part-time, service. This could be done by converting her part-time service into full-time equivalent (ie as she was working 17.5 hours per week instead of 35, to credit her with 0.5 years' service in respect of every year where she had been part-time) but still basing her payment on a full-time wage. The

⁵¹⁴ Paragraph 58 of the opinion

⁵¹⁵ Mark Bell “A Patchwork of Protection: The New Anti-Discrimination Law Framework”, *The Modern Law Review*, Vol. 67, No. 3 (May, 2004), pp. 465-477 at 470

Court of Appeal rejected this, noting that it was wrong to say "...that an employer can never justify indirect discrimination in a redundancy payment scheme unless the form of the scheme is shown to be necessary as the only possible scheme"⁵¹⁶.

5.3.39 In *Chief Constable of West Midlands Police v Blackburn*⁵¹⁷ a gloss was added to the Court of Appeal's comments in *Barry*. The EAT, in reconciling *Barry* with CJEU case law such as *Kutz-Bauer v Freie und Hansestadt Hamburg*⁵¹⁸, noted that it would not "...be possible for the employer to demonstrate that the means are appropriate or reasonably necessary if there is evidence that less discriminatory means could be used to achieve the same objective."⁵¹⁹ The issue in some cases may be that, as there is no reference to this test in the legislation, the point is not raised in argument by either party and thus the ET does not consider it.

Conclusion on indirect discrimination

5.3.40 The most significant problem with the indirect discrimination provisions is the fact that there is a great deal of uncertainty as to what the correct pool may be in any given scenario. This has meant that courts have reached contrary conclusions on cases which appear to be extremely similar. There is also the theoretical difficulty that basing protections on sex ignores the fact that parenting should be done by both mothers and fathers. On this basis, rights should be derived from parental status, not sex.

5.4 Positive action

5.4.1 The EqA does not only prohibit direct and indirect sex discrimination, it also contains some positive action provisions. Could these be of any use to parents? The provisions permit positive action in certain circumstances where people who share a particular protected characteristic suffer a disadvantage, have particular needs or are disproportionately under-represented. In these circumstances an employer can take

⁵¹⁶ *Barry*, 336

⁵¹⁷ [2008] ICR 505

⁵¹⁸ Case C-187/00, [2003] ECR I-2471

⁵¹⁹ Paragraph 509 of the judgment

proportionate measures to enable or encourage persons with the particular protected characteristic to overcome the relevant disadvantage, meet their needs or enable or encourage their increased participation (this is referred to as “**general positive action**”) or, in relation to recruitment and promotion, can treat a person with the relevant protected characteristic more favourably than others so long as the individual is “as qualified as” those others. For the reasons set out below, the positive action provisions are of little use to parents. An employer who offered more favourable treatment to parents would not be in breach of the EqA if the more favourable treatment was offered irrespective of the sex of the parent. There would clearly be no direct sex discrimination and the risk of an indirect sex discrimination claim would seem relatively low if the favourable treatment were offered to parents of dependent children, rather than, for example, the person with primary responsibility for a child. There might, however, be a risk of an indirect age discrimination claim – on the basis that those in particular age brackets are less likely to have dependent children but could potentially have similar needs in relation to time off if they care for grandchildren, which is becoming increasingly common⁵²⁰. With an indirect discrimination claim, the employer could provide an objective justification for the differential in treatment and it would seem likely that any objective justification would be similar to the positive action provisions (that is, the employer might argue that parents are disadvantaged by a particular provision in a way that other employees are not and therefore that the more favourable treatment is justified; a similar argument would apply in relation to the positive action provisions).

Can the sex discrimination provisions be of any use to parents in their current form?

5.4.2 Although there are some aspects of the discrimination provisions that could be improved in order to make them more effective at securing the rights that parents need in order to properly combine work and family responsibilities, the sex discrimination

⁵²⁰ Research by the TUC found that 41% of grandparents looked after their grandchildren for up to 7 hours per week with a further 8% looking after their grandchildren for more than 21 hours per week. (“Age Immaterial: Women over 50 in the Workplace – a TUC report”, February 2014)

legislation has some significant positive aspects which make it appealing for claimants to use. These are outlined below:

5.4.2.1 It applies to workers and applicants, in contrast to many of the employment rights (such as unfair dismissal) which apply only to employees.

5.4.2.2 There is no qualifying period of employment required to bring a claim⁵²¹.

5.4.2.3 The possibility of forum shopping where an employee can show a connection with another jurisdiction in which damages may be higher than those that would be recovered in the UK⁵²² (for example, the US⁵²³).

5.4.2.4 Compensation is uncapped, unlike other ET claims such as unfair dismissal.

5.4.3 The direct sex discrimination provisions are of limited use to parents as in most cases the problems that parents face are not connected to their sex or even their parental status. This is because the direct discrimination provisions still have a male unencumbered worker as the reference point. The reason that parents are disadvantaged in the workplace is the fact that they do not/cannot comply with the norm of the ideal worker and, for example, need time off or to work differently (whether in relation to where or when they work).

5.4.4 The indirect sex discrimination provisions may have greater use for parents, however, even these are unlikely to secure the accommodations that parents need to be on an equal footing with others in the workplace. As set out above at 5.3.16, it is

⁵²¹ In order to bring a claim for unfair dismissal, for example, an employee must have been continuously employed for a period of two years.

⁵²² Whilst forum shopping is likely to apply in limited cases, in the last ten years, there has been a greater recognition of the possibility for higher earners (see for example “Company Uniform”, *The Lawyer*, Peter Frost/ Anne Harrison, 11 December 2006, p21) and the claim against Dresdner Kleinwort Wasserstein, which includes a UK employee.

⁵²³ By way of example, in the US, a \$1.4 billion sex discrimination claim was brought against Dresdner Kleinwort Wasserstein by five US female employees (Jyoti Ruta, Maria Rubashkina, Joanne Hart, Traci Holt and Kathleen Treglia) and Katherine Smith, a UK employee. The claim does not appear to have been further reported although it is rumoured to have been settled.

considerably easier for mothers to bring indirect sex discrimination claims than fathers, and, if fathers become more actively involved in caring for children, it may become impossible for either parent to seek to bring an indirect sex discrimination claim. The major difficulty for anyone seeking to bring an indirect discrimination claim relates to the unpredictability of the composition of the pool (as discussed above), which seems unlikely to be resolved. Whilst the courts have recognised this issue – for example, see comments in *Grundy* relating to the issues faced by Tribunals in determining the pool (discussed above at 5.3.15 to 5.3.26), they have still failed to provide any real guidance to Tribunals as to how to determine this difficult issue. The flexibility of the concept of indirect discrimination can be seen as both a strength and a weakness. Whilst it is true that, because of the nature of the types of dispute, they will also be very fact specific, the extent of the flexibility means that claimants and potential claimants have no certainty over whether a particular practice operated by an employer will be found to be discriminatory, irrespective of the significance of the impact that that practice has on the particular employee. As the EAT noted in *Kidd*, this means that it is impossible to draw “generalised conclusions” from decided cases and that sometimes cases “in apparently similar contexts ... [arrive] at opposite results”. This means that it may be impossible for a claimant (or his/her lawyers) to determine the likely outcome of a claim against an employer until the matter has been litigated and, as will be examined in more detail in Chapter 6, often the process of litigating a claim is so difficult that this will deter potential claims.

CHAPTER 6 : ENFORCEMENT OF PARENTAL RIGHTS

6.1 Introduction

6.1.1 As set out in Chapter 1, for there to be effective reconciliation of work and family responsibilities, the law must provide the relevant rights, and society (and employers) in particular, need to understand the importance of these rights. This is more likely to be the case where there are serious consequences in the event of a breach of the relevant rights and there are effective enforcement mechanisms. John Purcell suggests that "...statutory regulation is more likely to influence managerial conduct in employment ... when enforcement processes are effective"⁵²⁴. This is very important as the aim would be for employers to abide by the rights set out in the legislation, rather than them flouting them and workers then needing to bring litigation to enforce them. The mechanisms that are available for the enforcement of those rights will therefore be crucial to the overall effectiveness of the rights. In this chapter I argue that the current methods of enforcement (in respect of the rights described in Chapters 3 and 4 and the sex discrimination provisions described in Chapter 5) are not fit for purpose. The analysis that follows is not a critique of employment rights generally but is instead focussed on the rights described in the foregoing chapters.

6.2 Process by which claims are brought

6.2.1 As well as the problems in relation to the specific remedy that can be awarded in respect of each of the parental rights, there are also some difficulties for parents in enforcing their rights. Employment claims, whether brought under the unfair dismissal provisions described at 3.1.6 or in relation to the enforcement of the rights set out in Chapters 3, 4 and 5, are brought in an Employment Tribunal ("ET"), rather than a court. Originally the ET (which at the time was called the Industrial Tribunal) was designed to be a less formal setting, but the process has developed such that there is a greater emphasis on rules and procedure and it has become much more formal and rigid. There

⁵²⁴ John Purcell, Management and Employment Rights in Linda Dickens (ed) *Making Employment Rights More Effective: Issues of Enforcement and Compliance* Hart Publishing, Oxford, p178

are a number of aspects, in particular, of the ET rules that are likely to impact upon parents bringing claims to enforce one of the parental rights.

Time limits

6.2.2 A potential claimant must bring his/her claim within the relevant limitation period⁵²⁵; if s/he fails to do so, the claim will generally be time barred⁵²⁶. James suggests that the standard in respect of time limits "...caters for the needs of a stereotypical ideal unencumbered worker... whose only, or main priority is to deal with the matter as swiftly as possible"⁵²⁷. It is true that where an individual has childcare responsibilities, which take time to deal with, or is adjusting to a new child, imposing the same standard on them as for an unencumbered worker causes real difficulties and places them at a profound disadvantage. However, there is some merit in these issues being dealt with swiftly, particularly where a worker remains employed by the employer. As such, requiring a potential claimant to bring a claim relatively quickly is not necessarily a bad thing. The problem with the time limits, though, is the consequence of missing them. This is so severe that it effectively denies justice to those who have genuine difficulty in complying with the time limits. The ET may grant an extension to the time limit for filing a claim. (In relation to unfair dismissal and detriment claims in respect of parental rights, this can be done where the ET is satisfied that it was not reasonably practicable for the claim to be brought within the usual limitation period⁵²⁸ and in relation to discrimination claims, this can be done where the ET considers it to be just and equitable to do so⁵²⁹). However, as this is a discretionary ability, a claimant in a particular case will not know, in advance of the expiry of the time limit, whether the ET would consider that it was not reasonably

⁵²⁵ In respect of unfair dismissal claims, this is three months from the date on which the employee was dismissed (s111(2) ERA); in respect of discrimination claims, this is three months from the date on which the discriminatory act occurred (or if there was a series of acts, the date of the last of those acts); A complaint for detriment must be brought within 3 months of the act or failure to act complained of, or, if not reasonably practicable to do so, within such further period as the tribunal considers reasonable.

⁵²⁶ In respect of unfair dismissal claims, the claim may still be brought if it was not reasonably practicable for the employee to comply with this time limit, and the employee has brought the claim within a reasonable time period. In respect of discrimination claims, the claim may still be brought within such period as the ET thinks is just and equitable.

⁵²⁷ James (n15), p92

⁵²⁸ S111(2)(b) of the ERA

⁵²⁹ S123(1)(b) of the EqA

practicable for the claimant to have brought the claim earlier (and there is no process by which a claimant can apply for a ruling on this issue in advance of the relevant deadline).

6.2.3 Given the unequal division of childcare responsibilities, this is more likely to have a greater impact on women (as they are more likely to have such responsibilities and so face greater difficulties in bringing a claim). Ignoring the effect of having a child, or having to care for a child, reinforces the ideology of motherhood, discussed earlier in Chapter 2, as being something that is natural and does not need to be taken into account in the workplace, thereby also reinforcing the idea of the separate spheres. As I have argued in Chapter 2, we need to replace the current model for family-friendly rights with one that, rather than requiring assimilation, accommodates and values the responsibilities for childcare that parents have. In doing so, the enforcement mechanisms would need to change to recognise that some claimants, including those with childcare responsibilities, may be less able to comply with relatively short time limits.

Accessibility of the tribunal system

6.2.4 As set out above, there are specific time limits that prospective claimants need to comply with to bring a claim. There are also prescribed forms⁵³⁰ that they must use in doing so. Claimants in general may find the tribunal system difficult to understand. A pilot study carried out by Busby and McDermont in relation to "...perceptions and experiences of vulnerable employees who attempted to use the ... ET system to resolve disputes..."⁵³¹ found that unrepresented claimants had difficulty understanding their employment rights and the process, itself. In Genn's study she also found that there was a "... profound need for knowledge and advice about obligations, rights, remedies and procedures for resolving justiciable problems"⁵³². The difficulties facing parents and pregnant workers are made worse by the fact that the legislation designed to facilitate the reconciliation of work and family responsibilities is so difficult to understand, particularly

⁵³⁰ Rule 1(1) Employment Tribunals Rules of Procedure

⁵³¹ Morag McDermont and Nicola Busby (2012) 'Workers, marginalised voices and the employment tribunal system: some preliminary findings' *Industrial Law Journal* Vol. 41(2) 2012 166-184

⁵³² Hazel Genn (1999) *Paths to Justice: What People Do and Think About Going to Law*, Oxford: Hart Publishing, p255

for unrepresented claimants. Where the rights are as complex as those discussed in Chapter 3, 4 and 5, potential claimants may struggle to even determine whether they have a legal claim; formulating this into a claim form, setting out the legal basis of that claim, may prove to be very difficult. Engaging a professional representative could assist prospective claimants in both determining the strength of their claims and the process of bringing these. However, as set out below, the costs associated with professional representation are likely to deter many from using them.

Professional Representation

6.2.5 Given the complexities of formulating and bringing a claim, many prospective claimants will want or need to take legal advice in order to bring a claim. However, in England and Wales legal aid is not available for representation in the ET⁵³³. The average (median) cost of professional advice and representation for an employee to bring an unfair dismissal claim in an ET increased from £1,400⁵³⁴ to £2,000 in the ten year period from 2003⁵³⁵ to 2013⁵³⁶. Few employees will be able to afford these legal fees and as a result many claimants will represent themselves at an ET hearing. Whilst 67 per cent of employers had legal representation at an ET hearing, only 33 per cent of claimants were legally represented⁵³⁷. This seems contrary to the principle of natural justice that requires that proceedings be conducted in such a way as to be fair to all parties.

6.2.6 This is particularly important because professional representation appears to make a profound difference to the outcome of a case. The study carried out by Genn⁵³⁸, referred to above at 6.2.4, found that where a litigant is trying to deal with a legal problem themselves, they are less likely to be successful in obtaining a resolution, particularly

⁵³³ Under paragraph 2 of Schedule 2 to the Access to Justice Act 1999, the ET is not listed as one of the types of proceedings in which legal aid can provide advocacy. Those that are, are proceedings in: the Supreme Court, the Court of Appeal, the High Court, any county court, the EAT, any Mental Health Review Tribunal, Immigration Tribunal, the Special Immigration Appeals Commission and the Proscribed Organisations Appeal Commission.

⁵³⁴ Bruce Hayward, Mark Peters, Nicola Rousseau, and Ken Seeds 'Employment Relations Research Series No. 33 Findings from the Survey of Employment Tribunal Applications 2003'

⁵³⁵ Mark Peters, Ken Seeds, Carrie Harding and Erica Garnett, 'Employment Relations Research Series No. 107, Findings from the Survey of Employment Tribunal Applications 2008', March 2010,

⁵³⁶ Genn (n532)

⁵³⁷ Carrie Harding, Shadi Ghezelayagh, Amy Busby and Nick Coleman, "Findings from the Survey of Employment Tribunal Applications 2013", BIS, June 2014

⁵³⁸ Genn (n532), p204

where the problem is employment related (as opposed to, for example, being a consumer issue). In relation to pregnancy issues, James has noted that “[s]tatistical analysis of the tribunal study data strongly suggests that where claimants are professionally represented in these pregnancy-related unfair dismissal cases they are more likely to succeed...”⁵³⁹. It would seem likely that one of the significant reasons behind this is that this area of law is so complex, with various overlapping rights, that it makes it difficult for an unrepresented claimant to understand what her rights are, let alone apply those rights to her factual matrix.

6.2.7 By way of an illustration of the difficulties facing unrepresented claimants, let us consider the issue of how a claim is pleaded. In order for a claim to be successful, the claimant must fully set out the grounds for the claim. As an illustration, in discrimination claims, the claimant must state what s/he believes to have been the less favourable treatment; the claimant cannot subsequently in the hearing rely on another unpleaded action by the respondent as constituting less favourable treatment. For example, in the EAT case of *United Learning Trust v Miss H E Rose*⁵⁴⁰, the Claimant’s pleadings stated that various actions by the Respondent regarding unfair observation and criticism of her teaching by a particular individual constituted less favourable treatment. She did not state in her pleadings that the Respondent’s failure to respond to an email that she sent constituted less favourable treatment, but at the hearing sought to rely on this as being less favourable treatment. The EAT found that the Tribunal should not have considered this aspect of her case as it had not been pleaded. It noted that “[i]f justice is to be done to both sides, it must be clear by the time of the Tribunal hearing which specific allegations are said to be instances of direct discrimination. ... Fairness requires that those who face allegations of ... discrimination know what they are. Precision is necessary if the parties are to make informed decisions on questions of evidence and submissions and if the Tribunal is to deal with the issues properly”⁵⁴¹.

⁵³⁹ James (n15), p99

⁵⁴⁰ UKEAT/0220/12/LA

⁵⁴¹ Paragraph 32 of the Judgement

6.2.8 McDermont and Busby have suggested that there are also other important differences in the social spaces in which unrepresented claimants have to conduct their cases as compared to professional representatives. They contrast "...the solicitor in her well-ordered office, probably with a secretary to answer the phone, ... with the grandmother surrounded by the everyday noise and chaos of any household with young children..." noting that this "...creates an unseen, but nevertheless felt, power dynamic between employer and claimant"⁵⁴². In litigation there are often numerous deadlines, for example, disclosure and the exchange of witness statements; the consequences for failing to meet these deadlines can be severe, and include the possibility of the claim being struck out in its entirety. For the unrepresented claimant with caring responsibilities, a lack of a dedicated space in which she can prepare and store relevant documents without these being disturbed by other people (for example, children) means that there is a real risk that relevant (and perhaps crucial) documents could be overlooked or deadlines missed. (It should, of course, be noted that there will be other unrepresented claimants who may also be in living conditions that make it difficult to conduct litigation from their homes). Because of the ideology of motherhood, discussed in Chapter 2, which suggests that motherhood and caring are an entirely natural state for women, rather than something deserving of special consideration, no accommodation of these is necessary (and indeed providing them would, as a result, be perceived as giving mothers in these situations an unfair advantage).

6.2.9 To ensure fairness, in the enforcement of workplace parental rights claims, there needs to be a rebalancing between the interests of those entities that can afford legal representation (generally employers) and those that cannot (generally employees). This means that either it needs to be relatively easy for a claim to be brought (by the tribunal process being made as straightforward as possible and the law being as easy to understand as possible) or access to free/affordable legal advice should be provided for those claimants that cannot otherwise afford this. The latter seems unlikely to happen at

⁵⁴² McDermont and Busby (n531), 176

a time when legal aid is being heavily restricted, so the only real option is to make the system and the law more accessible. In addition, abandoning the ideology of motherhood and moving to a model where we value parenting, as advocated in Chapter 2, would mean that the ET system could more readily take account of the responsibilities that those with children have and accordingly could adapt the rules to accommodate these.

The Costs Position

6.2.10 A further deterring factor for potential claimants may be the costs involved in litigation. I argue here that the current position whereby an individual claimant not only has to bear the costs of bringing an ET claim in order to defend the right to reconcile his/her work and family situations, but also may, without any prior warning, be required to contribute potentially tens of thousands of pounds in respect of the costs of the employer against whom s/he is litigating, is inequitable.

6.2.11 The general rule in ET proceedings is that each party bears its own costs. However, there are exceptions to this where: there is vexatious, abusive, disruptive or otherwise unreasonable conduct in the proceedings; a claim has no reasonable prospect of success; or if a party causes an adjournment or postponement of a hearing or fails to comply with an order or practice direction of the ET.

6.2.12 In practice, costs awards remain the exception rather than the rule. ET statistics show that only 889 costs awards were made in the period from 1 April 2013 to 31 March 2014⁵⁴³. (In the same period, there were a total of 105,803 claims accepted by the ET.) The vast majority of costs award (72.7%⁵⁴⁴) were made against claimants. Whilst costs awards may still be relatively unusual, the awards that can be made against claimants can be a very significant amount particularly for an individual. In *Vaughan v London Borough of Lewisham*⁵⁴⁵, an employee who had been paid around £30,000 per year in her role at the Respondent, was ordered to pay a third of the respondent's costs. These were to be

⁵⁴³ Employment and EAT Tribunal Statistics: Financial Year 2013 to 2014

⁵⁴⁴ Of the 889 costs awards, 647 were against claimants (ibid)

⁵⁴⁵ UKEAT/0533/12

assessed in the County Court, but on the basis of the respondent's claim to have incurred approximately £260,000, could have been as high as £87,000. Whilst there are instances of large awards (in the 2013/2014 period, the highest award was £58,022⁵⁴⁶, the median award is relatively modest (in the same period it was £1,000).

6.2.13 Although it may not seem unreasonable for the ET system to seek to deter unreasonable claims or conduct, the difficulty is that, as set out below, a claimant may be unaware that there is a risk of a costs award in respect of the claim being brought. This is particularly an issue for unrepresented claimants and, for the reasons set out below, for those seeking to enforce one of the rights discussed in Chapters 3 to 5.

Whilst the ET may give a party a costs warning, it does not need to do so in order to subsequently make a costs award. Similarly, the other party to the litigation does not need to have given any indication that it intends to seek such an award. There are no statistics available on the frequency of costs warnings being given by the ET, however, an analysis of the reported cases in relation to costs shows an alarming picture. In cases where a costs award was made by an ET, a costs warning was only made in 11.6% of reported cases⁵⁴⁷. In the remaining 88.4% of cases either there was an express statement that a costs warning was not given (17.4% of cases)⁵⁴⁸ or there was no reference at all to a costs warning (71% of cases)⁵⁴⁹. In view of the case law discussed above, which has held that there is no obligation upon the ET to provide a costs warning but that it may be a relevant factor in favour of making such an order, it would seem likely that where there is no reference to a costs warning this is because one was not made.

6.2.14 One of the reasons for the apparent lack of costs warnings given in cases where costs are eventually awarded may be the fact that an ET may be subject to criticism by the appellate courts if they do so in circumstances where an award is less likely. In *Gee v Shell UK Limited*⁵⁵⁰, the Court of Appeal criticised the ET for issuing a costs warning to the

⁵⁴⁶ Employment and EAT Tribunal Statistics (n543)

⁵⁴⁷ See Annex 4. In 16 out of 138 cases

⁵⁴⁸ See Annex 4. In 24 out of 138 cases.

⁵⁴⁹ 98 out of 138 cases

⁵⁵⁰ [2002] EWCA Civ 1479

Claimant who withdrew her claim after the warning. The EAT and Court of Appeal both felt that there was no realistic prospect that a costs warning would actually be issued and so it had been oppressive and caused her to withdraw the claim. In *Salinas v Bear Stearns*⁵⁵¹, which was a case where costs were awarded despite a costs warning not having been made, the EAT stated “...we are far from clear...that a costs warning is a necessary or indeed desirable pre-condition...”. In *Iqbal v Metropolitan Police Service*⁵⁵², the ET was criticised for having given a costs warning at the start of a hearing and the EAT stated that “[t]he start of the hearing is a particularly sensitive and difficult time for a possible future application for substantial costs to be raised; we think that discussion of such a matter in open Tribunal at that point ... is usually best avoided.” In view of the above, there is little incentive for an ET to issue a costs warning – if it does so, it risks being seen to have pressurised the Claimant to cease pursuing a claim, whereas if it does not, it is still able to issue a costs order at the end of the proceedings.

6.2.15 Costs are likely to be a greater issue for parents because of the complexity of the legislation. It can be difficult for an unrepresented claimant to assess their claims chances of success (or whether there is any legal basis for a claim – an employer can have done something that is morally wrong but for which there is no recourse in law) or to know how to conduct litigation. As such, there would seem to be a greater risk that an unrepresented claimant would conduct their litigation in what the ET considers to be an unreasonable manner or would bring a claim, which an ET subsequently finds was misconceived.

6.2.16 The other issue in respect of costs is the apparent use of the threat of costs by employer’s lawyers to dissuade claimants from pursuing their claims. The Government implied, in its consultation document on changing the ET process, that it had anecdotal evidence of this type of threat⁵⁵³. This is clearly of concern. If a claimant is unrepresented

⁵⁵¹ [2005] ICR 1117

⁵⁵² UKEAT/0186/12/ZT

⁵⁵³ p34 of the Consultation Document

and is told that they might be liable for hundreds of thousands of pounds in costs⁵⁵⁴, they may feel unable to continue the litigation, even in a case in which the prospect of such a costs order is low⁵⁵⁵.

6.2.17 One solution to the issues above would be for greater information and transparency around the risks of costs to be available at the outset of a claim and for an ET to be required to give an early indication if it believed that there was a danger of costs being awarded against the claimant for any reason. However, this is unlikely to resolve the difficulties that are caused by the costs that the claimant has to bear in respect of his/her own litigation costs. It is for this reason that the current model of enforcement, which so heavily relies upon individual enforcement, seems not to be fit for purpose. I look at this issue further below at 6.3.

Obtaining information to determine whether there are grounds for a claim

6.2.18 As mentioned above, sometimes it can be difficult for a potential claimant to determine whether or not s/he has a valid legal claim. This is because the employer is likely to hold much of the relevant evidence and is unlikely to voluntarily provide this to the worker, particularly where it shows wrongdoing on the part of the employer. Although during the disclosure process this evidence has to be provided, by that time the claim is relatively progressed and both parties will have expended time and money in respect of it. It used to be the case that where a discrimination claim was contemplated, a prospective claimant could obtain information in order to determine whether they have grounds for a claim before launching proceedings. Under the process, questions could be asked about why the prospective claimant had been treated in the way that they were, and about general background information about the composition of the respondent's workforce (for example, the percentage of women in senior roles).

⁵⁵⁴ *Doyle v North West London Hospitals NHS Trust* [2012] ICR D21 where bills of £95,000 had been presented by the Respondent to the ET, is used as the basis for respondent's lawyers claiming that claimants may be vulnerable for large cost awards (although the £95,000 was subject to assessment by the ET to determine whether they had been properly incurred). Similarly, in *Vaughan v London Borough of Lewisham and others* UKEAT/0533/12, the EAT upheld a costs order of £87,000 against an unrepresented claimant.

⁵⁵⁵ *Gee v Shell UK Ltd* [2003] IRLR 82 – the Court of Appeal stated that costs awards were the exception rather than the rule.

6.2.19 The abolition of the questionnaire process (effective from 6 April 2014) is likely to have an adverse impact on employees' ability to bring tribunal proceedings. Without the questionnaire process, employees are being asked to decide whether to bring claims in the absence of little, or any, information to be able to evaluate their chances of success. Further, with the introduction of fees, they are effectively being asked to weigh up the value and merits of their case (which may be unknown due to a lack of information) against the fee which they will be charged (and which is not recoverable if they are then given information which shows their case is weak and they therefore abandon it) and the risk of costs, for example, if a claim is subsequently found to be misconceived. Where the right that the claimant is trying to enforce is one that would allow the claimant to carry out a socially useful function, which, as set out in Chapter 1, both pregnancy and caring for a child are, this places an unfair burden on the individual claimant. Again, this is a problem of the model of individual enforcement of these rights, which is discussed below at 6.3.

Burden of proof

6.2.20 There are also issues regarding the burden of proof. As discussed earlier, often, the employer, rather than the claimant, will have much of the pertinent information, for example, the reason for the claimant's treatment and, as such, is in the best position to gather all the relevant evidence. James has argued that where a dismissal occurs during pregnancy, the ET should acknowledge that such dismissals "...are often, given the potentially negative attitudes pregnancy can provoke and given the social construction of motherhood and its distance from the ideal unencumbered worker, motivated by the pregnancy *unless* there is strong evidence to the contrary"⁵⁵⁶. This would lead to a presumption that the dismissal was unfair, which could be rebutted by the employer providing appropriate evidence to the contrary. The advantage of such an approach is that the employer, in most cases, is likely to have the greater resources to be able to undertake the necessary searches to find evidence, but more importantly, the employer is

⁵⁵⁶ James (n15), p74

likely to be in possession of the key evidence. Without such a presumption, the employer can easily assert that it was not aware of the worker's pregnancy and, if the ET accepts that, the claim will fail.

6.2.21 The other difficulty is that the ET can only determine the outcome of the case on the basis of the evidence that each party presents to it. It is not the ET's role to formulate the claimant's case or to act in an inquisitorial manner. This means that, if a claimant fails to properly formulate his/her case, the ET cannot amend the claimant's case to correct this. It also cannot consider a claim that has not been raised. In respect of workplace parental rights, where there is significant potential overlap between the different rights, such that a claimant could easily bring a claim on the basis of a single right (for example, a refusal to allow flexible working could be brought under the right to request flexible working) and fail to consider whether they also have a claim under another overlapping right (in the same example, an indirect sex discrimination claim). The facts might be such that the first claim (in the example above, the right to request flexible working) has to fail, but the second (in the example above, indirect sex discrimination) could have succeeded had such a claim been brought.

Levels of compensation

6.2.22 As both parenting and pregnancy are social goods, there is merit in an argument that where a person is dismissed as a result of his/her childcare responsibilities, there should be a minimum basic award that s/he will receive irrespective of his/her length of service. (I would also argue that a minimum basic award should also apply where the reason for any dismissal was unlawful discrimination, contrary to the Equality Act 2010 ("**EqA**"). However, such arguments are outside the scope of this thesis.) Such a concept already exists in UK law in respect of terminations because an employee was carrying out health and safety activities⁵⁵⁷ or where the employee was dismissed for being: a health and safety representative⁵⁵⁸, an employee representative for the purposes of the Working Time

⁵⁵⁷ s100(1)(a) ERA

⁵⁵⁸ s100(1)(a) ERA

Regulations⁵⁵⁹ or for the purposes of collective consultation⁵⁶⁰ or a trustee of an occupational pension scheme⁵⁶¹. This minimum also applies where the principal reason for the dismissal was the employee's trade union activities⁵⁶². In such cases, there is a minimum basic award of £5,676. For the reasons set out in Chapters 1 and 2, pregnancy and parenting are important to society and employees should not be penalised for exercising rights that allow them to combine these responsibilities with work. A minimum basic award acts as a disincentive from employers dismissing employees, and also provides an additional element of compensation for the employee. This is why it only applies in respect of certain types of dismissal that the legislator has determined to be of particular concern. Dismissals in connection with pregnancy and parenting should, for the reasons set out in Chapters 1 and 2, be of concern to society as a whole and, therefore, should be subject to a minimum basic award.

Fees

6.2.23 Since 29 July 2013, a claimant bringing a claim in an ET is required to pay a fee in order to issue a claim and also in respect of a hearing; the amount of such fee being determined by the type of claim being brought, (claims will either fall within level 1 (the most straightforward) or level 2 (more complex claims) with the highest being £250⁵⁶³ in respect of issuing a claim and £950⁵⁶⁴ in respect of the hearing. Unfair dismissal, discrimination and equal pay claims are all charged at the higher rate. As such, the types of claim that will be brought by those seeking to enforce any of the parental rights are those that will be charged at the higher rate. Fees seem to have a direct impact on the number of claims brought. In 2012/2013 (fees were brought in during this period), there were 191,541 claims accepted by the Employment Tribunal Service, in 2013/2014, this had dropped to 105,803. This is a decrease of around 44.8%⁵⁶⁵. This is of concern because there is evidence that generally people are reluctant anyway to bring employment claims, even

⁵⁵⁹ s101(1)(d) ERA

⁵⁶⁰ s103 ERA

⁵⁶¹ s102 ERA

⁵⁶² s156 TULRCA 1992

⁵⁶³ For level 1 claims (for example, unlawful deduction from wages) the issue fee would be £160.

⁵⁶⁴ For level 1 claims the hearing fee would be £250.

⁵⁶⁵ $(191,541 - 105,803) / 191,541 = 0.4476$; 44.8%

without the introduction of fees. Purcell cites research “...that only a quarter (24 per cent) of those who experienced a problem at work put their concern in writing to their employer, and just three per cent brought a tribunal case as a result of their complaints”⁵⁶⁶. This is supported by the findings of the study conducted by Genn, referred to above at 6.2.4, which found that there could be “...a reluctance to be seen to be causing trouble...”⁵⁶⁷ in relation to employment disputes. This is problematic in relation to workplace parental rights because in most cases where an employer denies a worker the opportunity to use such a right, there will be an ongoing employment relationship, rather than a termination. Caring for a child is not yet seen as the vital social function that it is, in part because of the ideologies of motherhood and fatherhood. These view the rearing of children as natural for mothers and therefore not requiring any accommodation and fathers’ main role as being that of an economic provider and therefore they should not do anything to put their employment at risk. This means that parents would seem even less likely than other workers to bring ET claims.

6.3 Emphasis on individual enforcement

6.3.1 McCrudden suggests that our current approach “... leaves it too much up to individuals to enforce their rights”. Whilst McCrudden is concerned generally with the need for individual enforcement, this is an even greater issue in relation to pregnancy and workplace parental rights. Individual enforcement suggests that pregnancy is an issue only for the mother and that a parent’s inability to combine work and family responsibilities is an issue only for that parent. For the reasons set out in Chapter 1, this is incorrect. The emphasis on individual enforcement is entirely inappropriate in circumstances where we recognise that parents spending time engaged in childcare and women becoming pregnant is important for society and should be valued, as argued in Chapter 2. There is also the question of whether individual claimants can ever bring about the structural change that is necessary to better facilitate the reconciliation of work and family responsibilities. As noted above, tribunal cases do not always seem to change

⁵⁶⁶ Purcell (n524), p166

⁵⁶⁷ Genn (n532), p110

the behaviour of employers in respect of whether they adhere to the provisions of employment law. This is particularly important in the sphere of workplace parental rights, where compensation is unlikely to be a particularly useful remedy (see further below at 6.4.4) because if a parent requires time off, for example, and is denied this, money is unlikely to make up for missing a child's Christmas play or having to place a child into a childcare setting that a parent is not happy with (perhaps because the usual childcare provider is unable to provide the service on a particular day).

6.3.2 The ideology of motherhood, discussed in Chapter 2, may also dissuade women from bringing litigation. James suggests that "...the manifestation of the dominant ideology of motherhood in this context may prevent women from taking legal action because it shifts their emotional, financial and practical priorities"⁵⁶⁸. It is difficult to establish whether this does act as a disincentive from bringing litigation as it is impossible to know how many potential claimants do not bring claims. However, research by the EOC in 2005 suggested that 30,000 women per year were being forced out of their jobs as a result of their pregnancies. This would amount to unlawful pregnancy discrimination and, you might expect to see approximately this many pregnancy discrimination claims brought in any year. Yet in the period from 1 April 2013 to 31 March 2014, only 1,248 claims were brought in respect of detriment or unfair dismissal arising from pregnancy⁵⁶⁹. This suggests that there is a large number of women who think that they have been discriminated against, or subjected to detriment, because of their pregnancies, yet whom do not bring claims. One possible explanation of this is the dominant ideology of motherhood, as suggested by James above.

6.3.3 Morris argues that in other areas of regulation of employment there is "...a more proactive approach to enforcement has been adopted..."⁵⁷⁰ than in respect of cases that go through the ET system, such as though relating to workplace parental rights. She cites the examples of the licensing of gangmasters, health and safety executive and HMRC in

⁵⁶⁸ James (n15), p27

⁵⁶⁹ "Tribunal Statistics Quarterly", Ministry of Justice, 11 September 2014

⁵⁷⁰ Gillian Morris, *The Development of Statutory Employment Rights in Britain and Enforcement Mechanisms* in Linda Dickens (ed) *Making Employment Rights More Effective: Issues of Enforcement and Compliance* Hart Publishing, Oxford, p21

respect of the national minimum wage noting that "...the NMW is one area where, to date, a proactive model of enforcement appears to have met with some success"⁵⁷¹. Applying a similar model to the workplace parental rights would demonstrate that these are viewed as rights that are crucial to the wellbeing of workers and are valuable for society, in the same way that regulation of gangmasters and ensuring that people are being paid above a minimal rate are⁵⁷².

6.3.4 There was scope in the EqA for a move away from individual enforcement. The extension of tribunal's powers on recommendations to allow them to make recommendations in discrimination claims which benefit the whole workforce could, for example, have resulted in coordinated campaigns against a particular employer, where an organization (or even a coordinated group of employees) campaigning for parents or equality could support an individual claimant (for example, financially, allowing the employee to bring a claim with appropriate legal representation) in order to secure a recommendation that would benefit the whole, or part, of the workforce⁵⁷³. However, this provision is due to be abolished with effect from 1 October 2015. Whilst the Government's view was that this power was unnecessary, the few cases⁵⁷⁴ where the power to make wider recommendations was utilized suggest otherwise. In *Crisp v Iceland Foods Ltd*⁵⁷⁵, which was a case involving disability discrimination and constructive dismissal, an ET made a recommendation that the Respondent should, within one year, train all members of the HR function on disability discrimination matters and train all managers at the Claimant's line manager's level in disability discrimination matters. The Claimant was no longer employed and therefore these recommendations would not affect her. This case was decided when the ET had a wider power to make recommendations;

⁵⁷¹ *ibid*, p25

⁵⁷² For the avoidance of doubt, I am not suggesting that the current level of the minimum wage is reasonable or appropriate. A discussion of this is outside the scope of this thesis.

⁵⁷³ It is difficult to evaluate the actual impact that the wider recommendations power had, given that it has been in force for such a short period of time and there are few reported cases on this. The Government consultation refers to four employment tribunal decisions where recommendations have been made and a recommendation has also been made in a further unreported decision (*Stone v Ramsay Health Care UK Operations Ltd* (ET/1400762/11))

⁵⁷⁴ The Government consultation refers to four employment tribunal decisions where recommendations have been made (The four cases referred to are: *Crisp v Iceland Foods* ET/1604478/11 & ET/1600000/12; *Why v Enfield Grammar School* ET/ 3303944/2011; and *Austin v Samuel Grant* (North East) Ltd [2012] EqLR 617 and *Lycée Français Charles de Gaulle v Delambre* (UKEAT 0563/10).)

⁵⁷⁵ (ET/1600000/12)

this power allows them to make recommendations which benefits the whole workforce, whereas from 1 October 2015, the ET will only be able to make a recommendation which obviates or reduces the adverse effect on the complainant (that is the individual who brings the claim). It is difficult to understand how an ET could legitimately, without the wider power, make the recommendation which it did in *Crisp*; given that, as the Claimant had left the employer's employment, it clearly would not benefit her but had the potential to benefit the wider workforce and to avoid similar situations in the future⁵⁷⁶.

6.3.5 There is also no collective/representative action mechanism in the EqA or the ERA. This is despite the finding in the Civil Justice Council's report, *Improving Access to Justice through Collective Action*⁵⁷⁷ that "...there is a strong case for concluding that there is an unmet need for a collective action mechanism to enable the effective prosecution of claims arising out of discriminatory conduct and a clear need for such a mechanism to be introduced". The right not to be unfairly dismissed, the right not to suffer detriment as a result of exercising a parental right and the unlawful discrimination provisions all place the emphasis on individual enforcement. The conduct that an employer may be engaging in may cause harm to many employees, for example, an employer may refuse employ mothers in a particular role. Research suggests that an individual bringing a claim, even when that claim is successful, has little or no positive impact on the conditions of others within the organisation⁵⁷⁸. As such, individual employment rights may not secure the aim of ensuring equality for all, but instead only offer the hope of compensation for the particular individual who has brought the claim. Even if multiple or group claims were permitted under the legislation, the aforementioned research would suggest that this might have limited value in securing the rights of those who were not part of the group action.

⁵⁷⁶ Similarly in the case of *Stone v Ramsay Health Care UK Operations Ltd* (ET/1400762/11), which related to pregnancy discrimination and constructive dismissal, the Tribunal made recommendations regarding training (on the issue of maternity leave) and the amendment of the equal opportunities policy. Again, the Claimant was no longer employed and thus these recommendations would not affect her.

⁵⁷⁷ John Sorabji, Michael Napier and Robert Musgrove 'Improving Access to Justice through Collective Action: Final Report', November 2008

⁵⁷⁸ Evelyn Collins and Elizabeth Meehan, Women's Rights in Employment and Related Areas, in Christopher McCrudden and Gerry Chambers in "Individual Rights and the Law in Britain", Oxford: Clarendon Press, 1994

The role of trade unions / collective bargaining

6.3.6 Given that individuals have to prosecute their own claims against employers, trade unions can play a vital report in supporting union members in doing so. (Although it should be noted that the majority of employees are not trade union members⁵⁷⁹, so trade union involvement will not affect all workers.) Research carried out by Colling⁵⁸⁰ provides two examples of cases that have been supported by trade unions for strategic reasons, in an effort to set precedents (*Cadman v the Health and Safety Executive*⁵⁸¹, where the Claimant was supported by Prospect, and *Allonby and Accrington and Rossendale College*⁵⁸², where the Claimant was supported by the NAFTHE). However, Colling's research also suggests that trade unions feel that individual claims are a drain on their resources. This would indicate that they are probably less likely to support claims in this way. This may in part also be because, as Colling's research also indicates, the relationship that trade unions have with an employer may allow them to resolve these types of issue more effectively. This could be a more effective method of enforcement/remedy than tribunal proceedings as litigation invariably is expensive and time-consuming, as well as draining for the individual employee involved. The only downside of this mechanism for securing rights is the fact that, unlike litigation, there is no binding precedent on other employers. A precedent may persuade other employers that their current practices are outside the bounds of what is permitted by law and may ensure a wider effect than just on the employer that was directly involved in the litigation.

6.3.7 The other difficulty is that, whilst a trade union can act as a focal point for employee's complaints about their treatment by their employers, and can collate data on how many employees are suffering detriment as a result of exercising parental rights in the workplace, they cannot bring a case on behalf of an employee or group of employees. This means that an individual will still need to commence the proceedings and, thus, be

⁵⁷⁹ According to the Department of Business, Innovation and Skills' Statistical Bulletin on Trade Union Membership 2013 (May 2014), between 1995 and 2013, trade union membership has decreased from 32.4 to 25.6 per cent.

⁵⁸⁰ Trevor Colling 'What space for unions on the floor of rights? Trade unions and the enforcement of statutory individual employment rights' *ILJ* 2006, 35(2), 140 - 160

⁵⁸¹ [2004] EWCA Civ 1317

⁵⁸² [2004] ECR I-873

seen to be enforcing his/her rights against the employer. Given the reluctance of employees to bring a claim where they remain employed by the employer, this inability can result in claims not being brought. Further, trade unions only have limited resources. As such, they are unlikely to be in a position to fight each and every case relating to the enforcement of the parental rights, but will have to be selective in relation to the cases that they fight.

6.3.8 Despite the difficulties noted above, trade unions have an important role to play in the sphere of workplace employment rights in those organisations where unions are recognised. Colling has noted that “[a]wareness of statutory rights is highest amongst union members...Union members are also more likely to report dissatisfaction with their workplace and to pursue grievances...” He also found that union presence played a critical role in ensuring that any procedures that employers had to resolve disputes were actually effective. This can be seen in the statistics gathered by Colling: “[o]verall, union members are almost seven times more likely to report that their grievances are addressed effectively within the workplace...”⁵⁸³. This is supported by Purcell’s research where he has found that “...unionised firms tend to have fewer ET cases...it is not unionisation per se which leads to a lower number of cases but the existence of procedures giving employees a relatively risk-free avenue of redress and access to representation”⁵⁸⁴. This is important because if workers feel that they can raise issues and that these will be listened to, and action taken to remedy the issue, they are more likely to raise these. In the sphere of workplace parental rights this is particularly important because most issues will arise in the context of continuing employment (rather than the worker’s dismissal).

6.4 Remedies for specific rights

6.4.1 Having considered above the issues that apply to all ET claims, below I examine the remedies available where the specific rights discussed in Chapters 3 and 4 are infringed. I argue that the remedies that are currently available are inadequate and mean

⁵⁸³ Trevor Colling ‘Trade Union Roles in Making Employment Rights Effective’ in Linda Dickens (ed) *Making Employment Rights More Effective: Issues of Enforcement and Compliance* Hart Publishing, Oxford, p196

⁵⁸⁴ Purcell (n524), p178

that there is no disincentive for employers to ignore the legal provisions (other than perhaps the adverse publicity arising from an ET case).

Unfair dismissal and detriment

6.4.2 The possible remedies in respect of unfair dismissal are:

6.4.2.1 an order for reengagement or reinstatement.

Reinstatement requires the employer to treat the employee as if s/he had never been dismissed (i.e. s/he is re-employed on the same terms and conditions of employment and with no loss of continuity of service). Reinstatement is slightly different in that the employer is required to re-engage the employee in comparable employment. However, there is no right to an order for reengagement or reinstatement, the tribunal has a wide discretion in deciding whether to award either of these remedies, and must consider the three factors set out in the legislation:

- (i) the employee's wishes;
- (ii) whether it is practicable for the employer to comply with the order;
- (iii) whether there has been any contributory action by the employee.

6.4.2.2 a basic award

The basic award is calculated using a formula based on length of service, age and a week's pay and is effectively capped at £13,920⁵⁸⁵.

6.4.2.3 a compensatory award.

⁵⁸⁵ There is no cap *per se* but the maximum amount of a week's pay is £464 and the maximum number of weeks that can be awarded is 30.

The compensatory award is supposed to fully compensate the employee for any loss suffered⁵⁸⁶. There is a statutory cap⁵⁸⁷ of the lesser of (i) £76,574 or 52 week's pay.

6.4.3 The possible remedies in respect of a detriment claim are:

6.4.3.1 a declaration that the worker has been subject to detriment; and/or

6.4.3.2 an award of compensation of such amount that the ET considers just and equitable in all the circumstances.

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6.4.4 For the reasons set out below, it is also questionable whether the remedies for unfair dismissal and detriment are sufficient in circumstances where a parent is effectively being disadvantaged for having a child/children or some reason connected with this. As set out in Chapter 3, where parents are subject to detriment as a result of either their caring responsibilities or parental status, this can have potentially significant damaging effects for society as a whole.

Low levels of compensation

6.4.5 Compensation for unfair dismissal is set at relatively low levels. Awards in respect of unfair dismissal are capped at £13,920⁵⁸⁸ in respect of the basic award and £76,574⁵⁸⁹ in respect of the compensatory award⁵⁹⁰. However, in the majority of cases, employees recover significantly less than these maximum levels; between 1 April 2014 and 30 June 2014 the average (median⁵⁹¹) award was just £5,016⁵⁹². This causes several

⁵⁸⁶ *Norton Tool v Tewson* [1972] ICR 501

⁵⁸⁷ The cap does not apply where the reason for dismissal was that the claimant was carrying out health and safety activities, had made a protected disclosure or was selected for redundancy for one of these reasons.

These are unlikely to be of assistance to parents seeking to enforce one of the rights outlined in Chapters 3 to 5.
⁵⁸⁸ This is calculated by multiplying the employee's weekly wage (which is limited to £464 for the purposes of the calculation (s227(1) ERA in respect of those dismissals that occur after 6 April 2014) by the employee's number of years continuous employment with the employer (which is also limited to 20 for the purposes of the calculation (s119(3) ERA) and multiplied by an age factor, the maximum being 1.5.

⁵⁸⁹ s124(1) ERA, as amended by Employment Rights (Increase of Limits) Order 2014 (SI 2014/382).

⁵⁹⁰ Where a claim also includes a claim relating to discrimination, compensation is unlimited.

⁵⁹¹ Throughout this chapter references to average are reference to the median. This is because it is less likely to be affected by a single large award in the way that the mean would be.

⁵⁹² Tribunal Statistics: April to June 2014, MOJ, 11 September 2014

problems for all potential claimants considering bringing unfair dismissal claims. However, they have a great impact on parents/prospective parents for the reasons set out below.

6.4.6 The first is related to the lack of free/state aided legal advice and representation that is available, discussed above. The average cost of professional advice and representation for an employee to bring an unfair dismissal claim in an ET is relatively high (£2,000⁵⁹³) in comparison to the average amount of compensation awarded for an unfair dismissal claim (£5,016⁵⁹⁴). In most circumstances even if a claimant is successful in ET proceedings, s/he will have to bear his/her own costs. This means that legal representation will reduce the amount of the award that the claimant actually receives; by 39.9% if the average fee is charged and the average amount is awarded⁵⁹⁵. Whilst this is an issue for all claimants bringing unfair dismissal claims, it has a more acute effect on parents who have been dismissed in connection with their parental status or childcare responsibilities. As outlined in the previous chapters, the legislation in this area is horrendously complex. This makes it more difficult to properly formulate an unfair dismissal claim relating to a breach of one of these parental rights than if the employee was bringing a more straightforward unfair dismissal claim.

6.4.7 A further problem with low levels of compensation is that they are unlikely to deter employers from acting in the same way in future; it seems logical that if an employer knows that a particular practice will cost it a great deal of money, it is less likely to do it. This is a particular problem because, in unfair dismissal proceedings⁵⁹⁶, an ET cannot recommend or require that an employer change a policy which an ET considers to be unfair.

⁵⁹³ Harding et al (n537)

⁵⁹⁴ Harding et al (n537)

⁵⁹⁵ This is calculated as follows: $[5,016 - 2,000] \ 3,016 / 5,016 = 0.601$; 60.1% – so reduced by 39.9%

⁵⁹⁶ S124(2)(c) of the EqA allows employment tribunals to make recommendations (that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate (a) on the complainant; (b) on any other person) in discrimination cases

Is compensation an effective remedy?

6.4.8 As set out above at 6.4.2, compensation is not the only remedy for an unfair dismissal claim. Reinstatement or re-engagement may be a more effective remedy for those parents who are dismissed as a result of their parental status or childcare responsibilities, particularly for new mothers who may face additional difficulties that others do not.

New mothers

6.4.9 New mothers may have additional difficulties in applying for jobs and attending interviews as compared to other claimants due to the practical problems of combining childcare with their job hunt. A new mother may find, for example, that because she is out of work, and therefore not earning, she is unable to afford to place her child in a nursery, and thus has to spend time looking after her child. Whilst she may be eligible for social security benefits such as jobseekers allowance and income support, the low level of these benefits (the maximum jobseekers weekly rate for a lone parent is just £72.40⁵⁹⁷) and the high cost of childcare (in 2014, the typical weekly cost of a nursery place for a child under two years of age for 50 hours per week was £212.09 per week, rising to £283.66 in London⁵⁹⁸) may prevent her from applying for jobs as her childcare responsibilities may take up the majority of her time, and she may have no-one to look after the child while she attends interviews.. This may impact on whether the claimant can be seen to have mitigated her loss, and without evidence of mitigation, any compensatory award may be reduced to take this failure into account.

6.4.10 With a lack of affordable childcare and often long waiting lists for nursery places, mothers who are out of work may be left in a catch-22 position. If they do manage to find a suitable job, they may not be able to commence employment immediately because they need to find appropriate childcare (and they may be placed on a waiting list); they may not be able to find childcare prior to finding a job because of the high level of costs

⁵⁹⁷ Jobseekers' allowance is: £72.40 for a person who is over 25; £57.35 for those between 18 and 24.

⁵⁹⁸ Jill Rutter, "Childcare costs survey 2015", Family and Childcare Trust, February 2015

associated with childcare (which they cannot afford because they are out of work). There is little case law on this area and any cases tend to be very fact specific as the decision as to what steps a claimant should have taken will depend upon their personal circumstances. In *Ministry of Defence v Cannock*⁵⁹⁹, it was suggested that six months after the birth of a child (which at the time was the maximum period of maternity leave to which women were entitled under the legislation) a woman who had been dismissed was expected to be “actively looking for work and applying for jobs”⁶⁰⁰. This fails to appreciate the difficulties described above that mothers may have in finding and paying for childcare to enable them to be in a position to commence employment.

6.4.11 Other research has shown that, the longer that a woman is out of work, the less she is likely to earn on returning to work⁶⁰¹. In view of all this, the question arises of whether a more appropriate remedy for those who lose their jobs as a result of pregnancy might be reinstatement or reengagement⁶⁰²; both of which are remedies which are seldom used: of the 3,858 successful unfair dismissal claims in the year 2013-14, in only 13 (0.03%) was reinstatement or reengagement ordered⁶⁰³.

6.4.12 Mothers of young children may also find difficulties in finding a job because whilst, in theory, the law prevents an employer from refusing to take on an employee who is the primary carer of a young child (as this would constitute sex discrimination), in reality employers may be unwilling to take on an employee with a very young child. This view is supported by the findings of an EOC report which found that some employers “deliberately steer clear of taking on women of childbearing age”⁶⁰⁴. If these employers will avoid employing all women who are merely of childbearing age, it is likely that the

⁵⁹⁹ [1995] 2 All ER 449

⁶⁰⁰ At 480. The judge in this case also stated that in this situation a claimant “was not entitled both to stay at home, applying for any suitable job that might have ‘presented itself’ (whatever that might mean), to rear the children and to receive compensation.” (468)

⁶⁰¹ According to the British Household Panel Survey women who return to employment after a 1 year absence receive a wage which is on average 16.1% less than the one they had before and women and men that return to employment after an absence of 6 months or more experience a 13.6% drop in wages.

⁶⁰² An order for reinstatement is an order that an employee be employed on the same terms and conditions as prior to their dismissal, whilst an order for re-engagement is an order that an employee be re-employed on such terms and conditions as the employment tribunal considers to be comparable either to the job in which the employee was previously employed or other suitable employment.

⁶⁰³ Employment and EAT Tribunal Statistics (n543)

⁶⁰⁴ EOC (n244), p2

same employers will avoid employing women with young children. As such, a woman who has been unfairly dismissed because of her pregnancy may take longer than the average person who has been dismissed to find subsequent employment and, when she finds new employment, it may be at a wage lower than that she was previously paid. The cause of the woman's dismissal will have been the prejudice of her employer towards women who are/have been pregnant. As a society we generally acknowledge that prejudice and discrimination are not to be tolerated, hence the plethora of legislation on the issue. It would not seem unreasonable then that the woman should be placed in the position that she would have been in had she not been discriminated against – namely employed with her previous employer in the same job as she had prior to her maternity leave. This occurs in many other European jurisdictions, such as Austria, Greece, Portugal, Spain and Turkey. (For the same reason, I would argue that there should be greater use of reinstatement and reengagement in circumstances where a claimant has been unlawfully discriminated against and this has resulted in their dismissal. However, such arguments are outside the scope of this thesis.)

Parents

6.4.13 The issues set out above in relation to women on maternity leave arguably justify reinstatement/re-engagement being the preferred remedy in relation to dismissals which are as a result of pregnancy/maternity leave. Working parents may have similar issues and they may find it difficult to find employment which is sufficiently flexible to allow them to combine their work and family responsibilities. The right to request flexible working only applies after an employee has six months' continuous service with the employer. As such, the employee who is applying for a new job has no right to request flexible working (although s/he may be able to rely upon the provisions on sex discrimination, subject to the issues with this discussed in Chapter 5). It may, therefore, be more difficult for a parent with childcare responsibilities to find subsequent suitable employment. As parenting/childcare is important for society, it is unfair that parents should be disadvantaged in their search for roles which accommodate such responsibilities after they have been unfairly dismissed in connection with those

responsibilities. The easiest way to prevent this is to increase the extent to which reinstatement/reengagement is utilised in cases where parents are dismissed in connection with their parental responsibilities.

Failure to allow a parent to exercise a parental right

6.4.14 The remedy for failing to allow a parent to exercise a right to maternity, paternity or parental leave or EDL is a declaration and/or such compensation as the ET considers is just and equitable. There are no reported appellate cases on the matter of how to determine the appropriate level of compensation in these cases. It is therefore difficult to assess how significant the level of compensation might be. Further, for the same reasons as are set out above, it is questionable whether compensation is the most effective remedy. A better option might be for an ET to be able to require an employer to allow a parent to exercise one of these rights. However, this would be impossible to do within the current tribunal system as, based on the statistics regarding how long it takes for a case to reach a hearing (discussed below in 6.5.1), in most instances, it would be likely that the case would only be heard after the date when the parent wished to take leave had already passed.

6.4.15 If an employee is successful in challenging his/her employer's decision not to accept his/her request for flexible working, there are only limited remedies available and the amount of compensation that the tribunal is able to award being restricted to a maximum of 8 weeks' pay⁶⁰⁵ with the amount of a weeks' pay itself limited to the maximum provided under section 227 of the ERA, currently £464⁶⁰⁶. The ET may also order that the employer reconsider the application, although it has no power to compel the employer to change its decision and there is no guidance as to what happens should an employer fail or refuse to do so⁶⁰⁷. Given that there is no power for an ET to be able to compel an employer to change its decision, and the maximum amount that may be

⁶⁰⁵ Regulation 7 of SI 2002/3236 (Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002)

⁶⁰⁶ Employment Rights (Increase of Limits) Order 2014 (SI 2014/382)

⁶⁰⁷ The tribunal also has the power to make a declaration that a complaint to it is well-founded, although this seems to provide the employee with no actual benefit

awarded is £3,712⁶⁰⁸, an employee is unlikely to risk souring the employment relationship for a relatively small sum.

Sex discrimination

6.4.16 Large awards may be useful in the discrimination arena as they can effectively force employers to take action on an issue. No business wants to be hit with an award for several millions for something which was preventable and, as such, large awards can concentrate employers' minds on potentially discriminatory practices. However, whilst there is the potential for large awards to be made in respect of sex discrimination claims, it is rare for an ET to make such awards for the reasons set out below.

6.4.17 Some⁶⁰⁹ have expressed concern that reports of large awards of compensation lead to unrealistic expectations when the average award for sex discrimination in GB is relatively low by comparison. One way that such concerns could be eliminated would be to provide more information (perhaps through the Ministry of Justice website) to potential claimants on how discrimination claims is calculated. This way it would be clear that there is a correlation between the salary of the employee (or ex-employee) and the level of compensation awarded.

6.4.18 The purpose of the compensatory element of the award is to place the claimant in the position that s/he would have been but for the discriminatory act. In addition to this element, an ET may also award exemplary damages and injury to feelings (which can incorporate an element in respect of aggravated damages).

6.4.19 Exemplary damages may be available in discrimination claims, although this is an area of uncertainty. In *Deane v The London Borough of Ealing*⁶¹⁰, a race discrimination case, the Employment Appeal Tribunal ("EAT") found, based on an earlier court of appeal decision (*Gibbons v South West Water Services*⁶¹¹) that exemplary damages could only be awarded in respect of torts for which exemplary damages had been awarded prior to the

⁶⁰⁸ 8 x £464

⁶⁰⁹ Keith Potter, "Does shopping around to get the best payout really benefit the employee", *Personnel Today*, 6 June 2006

⁶¹⁰ [1993] IRLR 209

⁶¹¹ Unreported, 16 November 1992, CA

House of Lords decision in *Rookes v Barnard*⁶¹². The basis of this reasoning seems to have been undermined by *Kuddus v Chief Constable of Leicester Constabulary*⁶¹³, which, although not an employment case, found that there was no requirement that, as a matter of principle, a claim for exemplary damages should constitute a cause of action which had been accepted before 1964 as grounding such a claim. In a subsequent EAT case (*Virgo Fidelis Senior School v Boyle*⁶¹⁴) whilst the employee's cross appeal from the ET's refusal to order payment of exemplary damages was dismissed, the EAT suggested that there was no reason in principle why exemplary damages should not be awarded in discrimination cases if the conditions in *Rookes v Barnard* were met. These are that either there was oppressive, arbitrary or unconstitutional action by servants of the Government, or that the respondent's conduct was calculated by him to make a profit for himself. It is likely to be difficult to argue that an employer's conduct in acting in a discriminatory manner was calculated by him to make a profit for himself, and the majority of claims brought under this head have been libel and defamation cases where publications have been seen to have profited from libellous/defamatory stories about celebrities (for example, *Douglas and others v Hello! Ltd and others (No. 3)*⁶¹⁵). However, it is possible that the other head, oppressive, arbitrary or unconstitutional action by servants of the Government, may be of use to public sector workers as these workers may be able to show that the action of their superiors (who may be servants of the Government) are oppressive, arbitrary or unconstitutional. This occurred in *Michalak v Mid Yorkshire Hospitals NHS Trust*⁶¹⁶ where the Employment Tribunal made an award of exemplary damages based on the fact that one of the discriminatory decisions that had taken place was to suspend the Claimant and the suspension had been expressed to be pursuant to and under the provisions of a policy document prescribed by the Government. As such, the Respondents' actions amounted to oppressive, arbitrary or unconstitutional action by servants of the Government. The

⁶¹² [1964] AC 1129

⁶¹³ [2001] UKHL 29

⁶¹⁴ [2004] ICR 1210

⁶¹⁵ [2003] EWHC 786

⁶¹⁶ ET/1810815/2008

scope for exemplary damages, however is limited and exemplary damages are seldom awarded.

6.4.20 Aggravated damages are made where the conduct of the employer has aggravated the situation, perhaps through the conduct of an investigation of a complaint of discrimination, (for example, as in *Armitage, Marsden & HM Prison Service v Johnson*⁶¹⁷ where the employer attributed the problems that the Claimant was experiencing with other employees (which the ET found to be on the grounds of the Claimant's race) to a defect in the Claimant's personality. The ET awarded aggravated damages of £7,500), because the employer treated a complaint about harassment as a trivial matter (*HM Prison Service v Salmon*⁶¹⁸) or because of the way the employer (or its representatives) conducted the defence of a claim of discrimination (*Zaiwalla & Co v Walia*⁶¹⁹). However, whilst earlier cases suggested that aggravated damages could be a separate head of compensation, the EAT in *Commissioner of Police of the Metropolis v Mr H Shaw*⁶²⁰ suggested that this might not be the most appropriate method of dealing with this and that instead they should be included as a sub-heading of injury to feelings. This approach was followed in *Michalak* and no separate aggravated damages award was made.

6.4.21 Further, the injury to feelings award is effectively capped at £30,000. Section 119(4) of the EqA expressly provides for compensation to be awarded for the injury to feelings suffered by the employee and does not provide for a cap on the amount of this award. However, the amount of any award for injury to feelings is calculated according to the principles in the case of *Vento v Chief Constable of West Yorkshire Police*⁶²¹, (as revised by *Da'Bell v NSPCC*⁶²²). These set out three bands of award: (i) awards for injury to feelings of the most serious kind, such as a lengthy campaign of discriminatory harassment, should normally lie between £18,000 to £30,000; the middle band, where awards lie between £6,000 to £18,000, is reserved for serious cases which do not merit an award in the highest band; and (iii) awards for less serious cases such as where there is

⁶¹⁷ [1997] IRLR 162

⁶¹⁸ [2001] IRLR 425

⁶¹⁹ [2002] IRLR 697

⁶²⁰ UKEAT/0125/11

⁶²¹ [2002] EWCA Civ 1871

⁶²² UKEAT/0227/09

an isolated or one off occurrence should lie between £500 to £6,000. There seemed to be scope, following the decision in *Simmons v Castle*⁶²³, for the injury feelings bands to be subject to a further 10% increase. In that case, the Court of Appeal held that the level of general damages in certain types of claims should be increased after 1 April 2013 to reflect the fact that claimants were no longer able to recover success fees and after the event insurance premiums from respondents due to a change in the law. However, in *Chawla v Hewlett Packard Limited*⁶²⁴, the EAT held that the 10% uplift did not apply to injury to feelings awards in the employment tribunal.

6.4.22 The court in *Vento* also stated that only in exceptional cases should awards for injury to feelings exceed the top band. However, even awards of the upper limit are rare and are awarded only in extreme circumstances. Despite sex discrimination claims being uncapped, between 1 April 2013 and 31 March 2014, the median award for a sex discrimination case was £8,039, in only 6% of successful cases were awards made of £50,000 or more, with the largest award being £168,957⁶²⁵. The *Vento* principles seem to have effectively limited the level of awards in sex discrimination cases. In the year prior to the decision in *Vento* the largest award made was for £1,414,620⁶²⁶. In the year in which *Vento* was decided this fell to £91,496⁶²⁷.

6.4.23 Even in cases where the acts of sex discrimination have been extreme, ETs have not made injury to feelings in excess of the upper *Vento* limit. For example, in *Miles v Gilbank*⁶²⁸ an ET found that the acts of the employer and its director towards the employee who was pregnant constituted "an inhumane and sustained campaign of bullying and discrimination" that was "targeted, deliberate, repeated and consciously inflicted". The ET further found that the acts had shown "a callous disregard or concern for the life of [the employee's] unborn child." The ET stated that it had no hesitation in awarding the employee the maximum possible amount for her feelings, and awarded £25,000 (the upper *Vento* limit at the time). The court in *Vento* did not suggest that £25,000 should be

⁶²³ [2012] EWCA Civ 1039

⁶²⁴ UKEAT/0280/13/BA

⁶²⁵ Employment and EAT Tribunal Statistics (n543)

⁶²⁶ ETS Annual Report 2001/02

⁶²⁷ ETS Annual Report 2002/03

⁶²⁸ [2006] EWCA Civ 543

an absolute maximum. What it did say was that only in exceptional circumstances should awards exceed this. The facts of *Miles v Gilbank* are so exceptional and unusual that an ET could have awarded in excess of £25,000 for injury to feelings. Similarly in *Michalak*, despite a sustained period of victimisation after the Claimant raised concerns about unjustified payments made to her colleagues, the ET awarded only the upper *Vento/Da'Bell* limit of £30,000.

6.4.24 Since compensation for injury to feelings is effectively limited to £30,000, large awards will only be possible where there is a large award for loss. Cases of this type are unusual and tend to be limited to those who are relatively high earners and/or those who can show that they are unlikely to be able to work for a significant period of time. For example, in the case of *Michalak*, the Tribunal awarded a total of £4,452,202.60 to the Claimant who had been earning £117,764.50 per year⁶²⁹ and who was unlikely to ever be able to work as a doctor again. This, however, is an unusual case in that the discrimination suffered by the Claimant was so severe that it resulted in her suffering a severe psychiatric injury. For most claimants, even where there is a sustained campaign of discrimination, unless this has such a catastrophic effect that the claimant will never work again, it is more likely that s/he will be expected to find work within around 12 to 18 months of the tribunal hearing and will need to show that s/he has made reasonable attempts to mitigate loss. As set out in 6.4.9 a new mother may also have difficulty in finding a new job and in mitigating her loss if the employment tribunal holds her to standards with which a man without caring responsibilities could comply (which are the standards that were applied in *Ministry of Defence v Cannock*).

6.4.25 As the *Vento* bands have been set by the courts, rather than the legislature, there is no mechanism for upward review. Until *NSPCC v Da'Bell* the amounts that could be awarded under each of the *Vento* bands had not been increased to take account of inflation, and it is not clear when the tribunals or courts will next increase the bands.

⁶²⁹ This was comprised of her basic salary and additional allowances/payments.

Less favourable treatment of part-time workers

6.4.26 An ET can award such amount as is just and equitable in respect of any less favourable treatment which is not objectively justified, having regard to the infringement of the Part-time Workers Regulations 2000 (“**PtWR**”) and the loss suffered by the worker. Unlike the EqA which prohibits discrimination on the basis of certain protected characteristics, including sex, there is no separate injury to feelings component of any award of compensation. However similar to the EqA, there is no maximum award that an ET can make. Separate to a claim for less favourable treatment, an employee can also bring an unfair dismissal claim if s/he is dismissed (or selected for dismissal) as a result of part-time status.

6.4.27 No statistics are available on the average awards made in claims brought under the PtWR. However, given that no injury to feelings award is possible, it is likely that the average would be less than that for claims brought under the sex discrimination provisions of the EqA.

6.5 Solutions

Interim relief – a possible solution?

6.5.1 One of the barriers confronting most claimants bringing unfair dismissal claims will be how to afford the costs of running the litigation in circumstances where they have no income (as a result of having lost their jobs). Interim relief, whereby an ET can order reinstatement/reengagement pending final determination or, if the employer refuses to reinstate/reengage the employee, continuation of the employment contract, effectively removes this barrier. It is also particularly helpful in this regard given the speed with which an interim hearing is supposed to occur. According to Tribunal Statistics⁶³⁰, it takes an average of 38 weeks for the ET to resolve case involving a single claimant. In contrast, once a claimant has validly lodged an application for interim relief⁶³¹, an ET has to hold a hearing as soon as practicable, subject to giving the respondent at least seven days’ notice of this. There are no official statistics on how quickly the ET hears interim applications.

⁶³⁰ Tribunal Statistics (n592)

⁶³¹ To do so, the application must be lodged within seven days of the termination date.

However, the reported cases on this suggest that it is significantly quicker than other types of claim. Many of the reported cases do not specify the date of termination or the date on which the claimant applied to the ET for interim relief. However, of those that do, 43.8%⁶³² were heard within a month of the termination date and 81.3% were heard within two months of the termination⁶³³. The remaining cases were all heard within three months of the termination date.

6.5.2 Interim relief is currently only available where the reason for the employee's dismissal is for trade union membership or activity; making a protected disclosure; or undertaking activities in particular employee-representative type roles⁶³⁴. Morris has suggested it is likely "... that if interim relief were more widely available the effectiveness of the unfair dismissal jurisdiction in preserving employment would be much greater in that the tribunal would be ordering the continuation of the existing position rather than reintroducing the claimant to a workplace he or she has left"⁶³⁵. This argument is supported by the fact that, as noted at 6.4.11, reinstatement or reengagement is very infrequently ordered. One of the reasons for this is likely to be the fact that, by the time the claimant's claim is decided, the employer will have had time to fill the claimant's role, thus making reinstatement impractical. Interim relief would prevent this situation from arising as the claimant would remain in his/her role throughout the proceedings. This would thereby provide a more effective remedy, preserving the claimant's employment.

Alternative mechanisms for enforcement

6.5.3 Dickens has noted that "...too little weight is placed on state agency inspection, monitoring and enforcement, and on other levers which would require or encourage proactive employer action to deliver fairer workplaces by addressing structural, systemic and organisational issues, going beyond the individual cases of rights infringement"⁶³⁶.

⁶³² 7 out of 16 cases, see Annex 5

⁶³³ 13 out of 16 cases, see Annex 5

⁶³⁴ Health and safety rep, working time rep, pension scheme trustee or employee rep for the purposes of TUPE or collective redundancies.

⁶³⁵ Morris (n570), p20

⁶³⁶ Linda Dickens, *Fairer Workplaces: Making Employment Rights Effective* in Linda Dickens (ed) *Making Employment Rights More Effective: Issues of Enforcement and Compliance* Hart Publishing, Oxford, p206,

What alternative mechanisms for enforcement could be applied in respect of workplace parental rights? In some European countries, for example, France, Greece, Hungary and Italy, employment rights are monitored and enforced not only through the courts but also through the use of labour inspectorates. The UK has ratified ILO Convention 81, save for part II of this, which relates to Labour Inspection in Commerce. The advantage of a labour inspectorate that considers the compliance of an employer with its obligations towards parents is that there is no need for an employee to take any action in relation to the employer. This means that there is no reason for an employer to take retaliatory action against the employee – the employee cannot be seen as being disloyal or, indeed, for taking any active stance in relation to the enforcement. It is entirely for the labour inspectorate to determine if there is any issue which gives rise to concern. This would move the emphasis on enforcement away from the individual and would also demonstrate the importance of the parental workplace rights.

6.6 Conclusion

6.6.1 The current enforcement mechanisms are, as demonstrated, throughout this Chapter, inadequate. A more proactive approach to enforcement, with less emphasis on the individual needing to take action against his/her employer, would be more likely to prove effective. As discussed above at 6.5.3, other jurisdictions adopt a different approach, using labour inspectorates, rather than relying on enforcement by individuals. Dickens has suggested an alternative to this, within the confines of the existing GB system. She suggests that “[a] provision could be introduced to enable ETs to require such employers [who had been found to be in violation of the law] to take a ‘health check’, conducted by Acas for example, with a requirement to act on any deficiencies revealed...”⁶³⁷. The advantage of this would be that, once a claim had successfully been brought, the employer’s practices would continue to be monitored in an attempt to ensure that there was an ongoing positive outcome as a result of the litigation. The disadvantage of this is that it relies on an individual bringing a claim in the first place, and, for the reasons set out in this Chapter, there are significant difficulties for parents and pregnant

⁶³⁷ *ibid*, p214

workers in bringing such claims. For this reason, agency enforcement, whereby a third party (other than the worker) enforces the rights would seem to be the most effective method of enforcement.

6.6.2 The current mechanisms for enforcement are not fit for purpose. They can discourage workers from bringing claims by the amounts of compensation recovered being relatively low, the costs of bringing claims being relatively high and the fact that, although an a claim may be in the interest of the wider workforce or society as a whole (because, as set out in earlier chapters, it is in society's interest that men and women are able to combine work and family), the employee is the only person able to bring such a claim. Further, the fact that a worker has brought a claim often appears to have limited impact on the working conditions of other workers.

6.6.3 A further limitation is the fact that often the only remedy available is compensation. In many cases a more appropriate remedy might be some form of injunctive relief to require the employer to allow the worker to exercise the relevant right, or an order for reinstatement or reengagement where the employee has been unfairly dismissed in connection with her pregnancy or his/her childcare responsibilities. This would not necessarily require a significant overhaul of the existing tribunal system given that interim relief is already available in certain types of claim.

CHAPTER 7: Discrimination against Parents

7.1.1 In this chapter I will consider the best way to secure rights for parents in the workplace. This includes the need for time off, as well as provisions to prevent discrimination against, and detrimental treatment of, parents. As set out in the preceding chapters, there are already some employment rights which may assist parents. However, for the reasons set out previously, these are not sufficient to alleviate the disadvantage that parents face in the workplace when they attempt to combine work and childcare.

7.2 Leave to care for a new baby

7.2.1 If SPL does not resolve the issues facing parents in the first year of a child's life, what would? In Chapter 2 I proposed splitting leave for pregnancy and the physical recovery from any leave that is necessary to bond with or care for the new baby. I also proposed that any period of maternity leave should be relatively short (eight weeks) and that this should be accompanied by a longer period of "new child leave" which could be used by either parent. Here I will consider how such leave would operate. As set out in Chapter 4, the problem with the current SPL provisions is that these retain the emphasis on the mother as primary carer because the father's entitlement is conditional upon the mother's entitlement and whether she uses her full entitlement of maternity leave. This needs to change.

7.2.2 There are alternative options to this approach. These include: (i) providing each parent with a block of leave, (ii) providing each family with a block of leave, which it can then choose how to distribute between parents, or (iii) a hybrid of the previous two suggestions whereby each parent gets a block of leave with a block of leave for the family. The advantage of the first and third options are that, from the experience of other countries, having periods of leave that can only be used by fathers seems to result in an increase in uptake of leave by them.

7.2.3 The experience of other countries which have amended their gender neutral schemes to gender specific ones seems to support the idea that gender neutral parental schemes that include parents, rather than fathers explicitly, do not maximise take-up by fathers. For example, in Norway, a system of gender neutral parental leave was amended

from 1 April 1993 so that 4 weeks' leave was reserved exclusively for fathers. Before this amendment, less than 3% of fathers used parental leave. After the change in 1993, use of leave increased to 30% of eligible fathers and then to 51% in 1994⁶³⁸. Similarly in Germany, the gender neutral parental leave scheme was amended so that fathers had two months' leave for their exclusive use, and the uptake of fathers taking leave increased rose from 3.3% of eligible fathers in 2006 to 18.6% in 2009 and has continued to rise since (for children born in the third quarter of 2011, the figure is 27.8%)⁶³⁹. However it is important to note that in Germany, at the same time as this change was made, there was a change to the way in which leave was paid from a low flat rate to a percentage of earnings. It is therefore impossible to tell whether the increase in uptake of leave was due for the most part to either or both of these changes.

7.2.4 The problem with the first option outlined above is that it does not provide flexibility to families. Some may wish one parent to take a longer amount of leave than another. The third option is supported by the authors of the Demos Home Front report who concluded that there should be a "...system of parental leave that encourages shared parenting..." and that this should "...involve elements of 'use it or lose it' leave for mothers and fathers or partners as well as an element of transferable parental leave"⁶⁴⁰. In light of the fact that I would propose retaining maternity leave albeit for a significantly shorter period, I do not suggest that any of the "new child leave" should be reserved for mothers.

7.2.5 The next issue I consider is whether parents should be entitled to periods of discontinuous leave. One of the criticisms of SPL is that, whilst an employee can request discontinuous leave, the employer is not obliged to accede to this request. With workplace parental rights there is often the possibility of tension between the rights that parents need/want and the extent to which these might impact upon a business' ability to maximise profits. I acknowledge that discontinuous leave may not always be practicable. Whether such a request can be accommodated will depend upon a number

⁶³⁸ Mari Rege and Ingeborg Solli, "The Impact of Paternity Leave on Long-Term Father Involvement," Available at <http://core.ac.uk/download/pdf/6238666.pdf>

⁶³⁹ Sonja Blum and Daniel Erler. (2013) 'Germany country note', in: Peter Moss (ed.) "International Review of Leave Policies and Research 2013"

⁶⁴⁰ Lexmond et al (n70), p18

of factors including the size of the employer, the type of role, and the nature of the request from the employee. However, rather than allowing employers free reign to decide whether to grant such requests, it would seem preferable to include a duty for these to be properly considered by employers and only refused where there is a genuine business ground for doing so.

7.2.6 Similar issues arise in relation to multiple requests for continuous leave . There is a need to balance the interests of parents and the interests of employers. Automatically permitting a large number of “continuous” leave requests would effectively be the same as automatically permitting a single discontinuous leave request and the same issues outlined above in relation to discontinuous requests would apply. Equally though, parents need to be able to spend time with their new child, so a limited number of requests for continuous periods of leave should be permitted. Given that there was extensive consultation on the proposals for SPL and three requests was deemed appropriately to balance the needs of both parents and employers, this would seem to be an appropriate maximum number of requests that must be automatically granted. However, as every employee’s needs are different, I would propose that, in addition to this, employees be permitted to make further requests and there be a duty on employers to consider these in a proper manner and refuse only where there are genuine business grounds for doing so.

7.2.7 In addition to allowing parents to take leave, the EHRC report “Working Better” suggests that parents should be able to reduce their working hours during the leave period as opposed to taking leave. This has the advantage of allowing parents to spend some time with their new child, whilst continuing to work, and may allow parents to share parenting in a way that they have not previously been able to, by for example one parent working in the morning and caring for the child in the afternoon and the other working in the afternoon and caring for the child in the morning. This is not really a form of leave but rather a temporary change in working pattern. In paragraph 7.4 below, I advocate a new right for parents which would allow such a request to be made. On this basis I would not propose including this type of arrangement within any “new child leave”.

7.2.8 The final question is how much “new child leave” parents should receive. Two parent families are currently entitled to a total of 54 weeks’ leave (comprising 52 weeks maternity leave and two weeks’ paternity leave). As I have concluded that mothers should still receive maternity leave of eight weeks, this leaves 46 weeks’ leave remaining (assuming that we do not wish to increase current leave entitlements). As the purpose of amending the maternity leave regime would be to encourage fathers to increase their uptake of leave, the amount of leave reserved for fathers would have to be at least their current entitlement of two weeks. There is, however, a tension between reserving leave for fathers and allowing families maximum flexibility. Other jurisdictions, such as Germany and Norway, have reserved between 6 weeks and 2 months’ leave for fathers. There seems to be no reason to choose any particular length of time and, as such, I would suggest that the initial amount of leave reserved for fathers should be 4 weeks to balance the need to encourage fathers to take leave, and the need to be flexible for families. After a period of time, this amount could be reviewed depending on the uptake by each parent. If fathers have a reserved period of 4 weeks, this would leave 42 weeks remaining for the family to take as it chooses.

7.3 A new concept: parental discrimination

7.3.1 Even if the amendments proposed above were to be adopted, this would only resolve the issues that parents face during the first year of a child’s life.

7.3.2 As well as parents needing positive rights to enable them to combine work and family responsibilities, they may also need protection against discrimination as a result of the fact of being a parent. By way of example, an employer may be reluctant to employ anyone with childcare responsibilities because of negative stereotypes about parents in the workplace (such as a mistaken belief that parents will take greater periods of sick leave to care for their children⁶⁴¹). As identified in Chapter 5, the current protections against direct sex discrimination are only of use to parents to the extent that an employer treats mothers and fathers differently to each other, as opposed to treating parents differently

⁶⁴¹ Statistics from the ONS show that overall women with dependent children had the same rate of sickness absence as those with no dependent children.
(<http://www.statistics.gov.uk/CCI/nugget.asp?ID=1577&Pos=1&ColRank=1&Rank=192>)

to non-parents. Whilst there may be some arguments that could be constructed on the basis of age discrimination to try to address discrimination against parents, it is not entirely clear that these would be successful and using the direct age discrimination provisions has the disadvantage that age is the only protected characteristic where direct discrimination can be objectively justified. Therefore there seems to be a need to provide some additional protection to ensure that parents are not discriminated against in the workplace as result of their parental responsibilities. For this, and other reasons, the Fawcett Report "Gender Equality in the 21st Century: modernising the legislation" recommends the introduction of a new family status protection to assist in the move away from "out-dated assumptions about gender roles"⁶⁴².

7.3.3 Direct discrimination alone is unlikely to be of much use even if parental status is a protected characteristic. There are plenty of men in the workplace who are fathers but who may rely on their wives/partners/someone else to care for their children, and whose parental status may not negatively impact on them in the workplace. In the majority of cases, the issue will not be the fact that that someone has children, but that they need time off, flexible working arrangements or the like. In *Cordell v Foreign and Commonwealth Office*⁶⁴³ an accommodation that would allow the Claimant to undertake a particular role was refused by her employer on the basis that the costs of this were not reasonable. Ms Cordell brought a claim of direct discrimination which was unsuccessful because the reason she had been denied the role was the cost of the adjustment, not her disability *per se*. Applying this logic to cases where parents require an accommodation to do their roles, it is unlikely that a refusal to accommodate (or any disadvantage attached to it) would amount to direct discrimination as it would be the accommodation that would be the reason for the treatment, not the individual's parental status *per se*. That is not to say that there is no need for protection from direct discrimination against parents but direct discrimination protection alone is likely to be insufficient. For that

⁶⁴² Kate Bellamy and Sophie Cameron, "Gender Equality in the 21st Century: modernising the legislation", Fawcett Society, April 2008, p5

⁶⁴³ [2012] I.C.R. 280

reason, any new concept of discrimination should cover not only direct discrimination against parents but also discrimination caused by the needs of parents.

7.3.4 The Government considered whether a concept of parental discrimination was required but discounted it in the “Discrimination Law Review – A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain”⁶⁴⁴. This was on the basis that “[p]arents already benefit from a number of legal rights including some under discrimination law. In particular, the indirect sex discrimination provisions can be used to challenge practices which present more difficulties for women”⁶⁴⁵ and because “[a] broad anti-discrimination provision would cut across the balance achieved by the existing provisions, which are widely accepted”⁶⁴⁶. The first of these statements appears to be premised on women being the primary carers, given that it refers to the indirect discrimination provisions being used to challenge practices which present more difficulties for women, rather than parents. This appears to be a tacit acceptance of the fact that women, and not men, can generally utilise the indirect sex discrimination provisions in relation to childcare responsibilities. For the reasons described in Chapter 5, the indirect sex discrimination provisions may not always assist parents in their attempts to combine their work and family responsibilities so this statement is incorrect.

7.3.5 The second of these statements suggests that the existing rights for parents appropriately balance the interests of parents and employers and that the rights are readily accepted. This thesis has examined the extent to which the existing rights are sufficient to provide parents with rights enabling them to combine work and family responsibilities and has found that there are significant flaws in the current regime. The suggestion that the rights are widely accepted is also at odds with the research referred to in Chapter 1 which suggests that some employers seek to avoid employing women of childbearing age. If the rights of parents were genuinely accepted, then there would be no reason for employers to adopt this approach. Further, as set out in the preceding

⁶⁴⁴ “Discrimination Law Review – A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain” Department for Education and Skills, Department for Work and Pensions, Ministry of Justice, Department for Communities and Local Government: London, June 2007

⁶⁴⁵ *ibid*, p128

⁶⁴⁶ Discrimination Law Review (n644), p131

chapters, parents do not have adequate protection against discrimination and the rights provided are far from adequate to guarantee them the ability to combine work and childcare responsibilities. There does, therefore, appear to be a need for additional protection for parents. One question is whether this should also include pregnancy (being a period of time where a woman is a prospective parent) or whether the existing protection of pregnancy is sufficient.

Should pregnancy be included?

7.3.6 Pregnancy is both similar to and different from parenting. On the one hand, it is the pre-cursor to parental responsibility and there are aspects of it that affect both parents (for example, as discussed in Chapter 2, both parents have an interest in the health and well-being of the child⁶⁴⁷). On the other hand, it is a condition which directly affects only the mother, as the carrier of the child. It is also different from parenting in that, under the Equality Act 2010 (the “EqA”), pregnancy is a separate protected characteristic. As such, unlike other parents seeking to bring claims, pregnant workers do not need to rely on the sex discrimination provisions or try to run other creative arguments around the other protected characteristics (such as that set out in Chapter 5 regarding age discrimination).

7.3.7 The difficulty with advocating a change to the current position is that, unlike protection of parents, where there are problems with using the existing model to prevent discrimination, the provisions in relation to pregnancy are much less vulnerable to criticism. As set out in Chapter 5, in order to bring a pregnancy discrimination under the EqA, an employee does not (unlike for claims in respect of the other protected characteristics) have to show that she is treated less favourably than a comparator, but only that she is treated unfavourably. This is a significant difference and one that results in the discrimination provisions being particularly helpful for pregnant workers.

7.3.8 Pregnancy can also be differentiated from parenting in that it is sex-specific. By contrast, either parent can have primary childcare responsibilities (indeed, both parents could have equal joint responsibility for a child). As such, there is a far greater need for a

⁶⁴⁷ For the avoidance of doubt, I am not suggesting here that the father/mother’s partner should in any way be able to dictate what medical treatment the mother has in respect of her pregnancy. Such issues are outside the scope of this thesis. However, in the context of a couple who have decided that they wish to proceed with a pregnancy, it is clear that both will have an interest in the health and well-being of the child.

separate, non-gender specific provision prohibiting discrimination against parents. For these reasons, there is no need for pregnancy to be included within any prohibition of discrimination against parents.

7.3.9 Whilst the introduction of a prohibition on discrimination against parents would be helpful in preventing less favourable treatment of parents relative to other employees, this alone is unlikely to resolve all the issues faced by parents in the workplace. As set out above, in many cases the issue is the need to accommodate the particular needs of parents, rather than disparate treatment of them and non-parents. Below I explore a possible solution to this – the idea of reasonable accommodation.

7.4 A right to reasonable accommodation of parental responsibilities?

7.4.1 In the preceding chapters I have identified failings with the current regime of parental rights in the workplace. The most fundamental issue in combining work and family responsibilities is that the workplace has been designed to suit a male norm. As such, it fails to provide an environment in which parents' needs can be accommodated. This is not a deliberate act of discrimination by particular employers, but rather is a pervasive issue across most, if not all, workplaces.

7.4.2 One of the difficulties with the current approach is that it "... encourages a perception that anti-discrimination law is only concerned with the abnormal behaviour of some bigoted individuals, rather than with achieving social transformation"⁶⁴⁸. In the arena of family-friendly rights, the issue tends not to be hostility towards parents, but rather a failure to appreciate that the way in which the workplace and its practices are structured favour workers without caring responsibilities, with no consideration of whether this needs (for rational business reasons) to be the case. As Smith has noted "[t]hose who are struggling to balance work and family commitments face an entrenched and persistent conception of the ideal worker as being unencumbered"⁶⁴⁹.

The right to request flexible working is an illustration of an attempt to resolve these types of issue but, for the reasons set out in Chapter 4, whilst this right is helpful, the grounds

⁶⁴⁸ Colm O'Cinneide "Positive action and the limits of existing law", 13 *Maastricht J Eur & Comp L* 351 (2006)

⁶⁴⁹ Belinda Smith "It's about time - for a new regulatory approach to equality", 36 *Fed L Rev* 117 (2008), 136

on which a request can be granted are so wide as to effectively permit most employers to find a basis for refusal of requests (if they so wish). Similarly, the right to request flexible working does not appear to have had a significant impact on the way in which workplaces are structured in general – whilst it may permit changes to hours, place of work and the like to those who feel able to make a request, it may not assist those parents where employers are so anti-flexible working that it is obvious that no request would be granted or that requests will only be granted for workers in particular roles. However, the issues faced by parents do not relate solely to flexible working. As such, whilst an effective right guaranteeing parents flexibility over their working hours or the location where they undertake their work would enable some parents to better combine their normal childcare responsibilities with work, it would not resolve all the issues faced by parents in the workplace. The other issue frequently faced by parents is a need for time off, which is currently addressed through the provisions on emergency dependant's leave (“EDL”) and parental leave.

7.4.3 The current model of trying to identify particular rights that parents need has meant that the rights have developed in a piecemeal way and do not meet the needs of parents. A different approach is therefore needed; one that can adapt to the needs of the individual and his/her family circumstances. A duty to make reasonable accommodation in respect of caring responsibilities may be the solution, in combination with provisions preventing discrimination against parents.

7.4.4 How such a duty would operate is considered further below. However, there is first the issue of whether this approach would be permissible under European law.

European law issues

7.4.5 One of the reasons presented by the government for not extending the concept of reasonable adjustments beyond disability discrimination is that this is not possible because of limits placed by European law⁶⁵⁰ in respect of positive action. The comments

⁶⁵⁰ Discrimination Law Review (n644), Chapter 4

of Baroness Hale in *Archibald v Fife*⁶⁵¹ that reasonable adjustments "...necessarily entails a measure of positive discrimination" are cited by the government in support of its position. However, not everyone agrees that reasonable adjustments are a form of positive action. Waddington and Bell argue that these are distinct concepts⁶⁵², in part because "[u]nlike most forms of positive action that are aimed at members of socially or economically disadvantaged groups, reasonable accommodations generally possess an individualized character, and are framed in terms of an individual right"⁶⁵³. This may be true in the employment sphere where the duty to make reasonable adjustments is very much focussed on the impact that a particular employer's practice or policy has on a particular disabled person. But, as will be discussed below, in the context of the provision of services a wider duty to make reasonable adjustments exists. This seems to be more group-orientated.

7.4.6 However, a duty to make reasonable adjustments for caring responsibilities would provide equal rights to all parents and would not directly discriminate against either sex. I also, below, dispute the argument that providing rights to parents could amount to indirect discrimination (on the basis that women would be more likely to utilise such rights).

7.4.7 There are some European rulings in relation to indirectly discriminatory measures which might be helpful in establishing that any right to reasonable adjustment would be objectively justified under European law. The case of *Julia Schnorbus v Land Hessen*⁶⁵⁴ concerned a rule giving priority to a training course, which those wishing to be lawyers were required to undertake, to those who had completed compulsory national service where the number of applications for the course exceeded the number of places. There was no compulsory national service for women, which meant that effectively women were excluded from the potential benefit of this rule. The CJEU ruled that this measure did not amount to direct discrimination as it did not overtly refer to the sex of

⁶⁵¹ [2004] UKHL 32

⁶⁵² Lisa Waddington, Mark Bell, "Exploring the Boundaries of Positive Action under EU Law: A Search for Conceptual Clarity", 48 *Common Market L. Rev.* 1503 (2011)

⁶⁵³ *ibid*, 1518

⁶⁵⁴ C79/99, [2001] 1 CMLR 40

the individual. It also ruled that the rules were justified insofar as they sought to reduce the inequality suffered by men as a result of the obligation to do national service. Applying this logic to the issue of parental responsibilities and a duty to accommodate these, so long as any requirement did not go beyond what was necessary to reduce the inequality suffered by women as a result of childcare obligations, any disparate impact is likely to be justified. Further, in the event that parental responsibilities began to be more evenly shared by parents, the potential for successful indirect discrimination claims would clearly decrease.

7.4.8 The case of *Lommers v Minister van Landbouw*⁶⁵⁵ is also a helpful illustration of the type of issues that might be considered in weighing up the objective justification test, although the issue arose in the context of direct, positive, discrimination. This case concerned nursery places at a Ministry nursery which were reserved exclusively for women because women were underrepresented at the Ministry and a lack of childcare was a barrier to women's employment. Men were only able to access these nursery places in an emergency, with the exception of male single parents who could access places on the same basis as women. The CJEU ruled that this provision could be permissible under European law. It acknowledged that the situations of male employees and female employees were comparable in relation to the possible need for them to use the nursery. However such treatment would be justified if there was a significant underrepresentation of women (both in terms of the number of women working there and their occupation of higher grades) and the insufficiency of local nursery places was likely to be a factor in this. This was a matter for the courts of the Member State to determine based on the facts before them.

7.4.9 Even if a duty to accommodate parental responsibilities was to amount on its face to direct discrimination (which, for the reasons above, I believe is unlikely), this would not necessarily mean that this would contravene European law. As set out below, European law would permit positive discrimination in some circumstances.

⁶⁵⁵ C476/99, [2004] 2 CMLR 49

7.4.10 Article 2 of EU directive 76/207/EEC provides that "...the principle of equal treatment shall mean that there shall be no discrimination whatsoever on the grounds of sex either directly or indirectly by reference in particular to marital or family status." This would appear to prohibit any form of positive discrimination, however, article 2(4) of the same directive states that "Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women."

7.4.11 Article 141(4) (effectively replicated by article 157 TFEU) States that "[w]ith a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to ... Prevent or compensate for disadvantages in professional careers." As such, positive discrimination may be permissible so long as it seeks to prevent or compensate for disadvantage caused in the workplace.

7.4.12 The case law of the CJEU has considered what sorts of positive action measures might be permissible. In *Kalanke v Freie und Hansestadt Bremen*⁶⁵⁶ the CJEU held that automatically prioritising women for promotions in sectors where they were underrepresented was not permissible under European law. The CJEU commented that "national rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in article 2(4) of the Directive." In the same case, the Advocate General, whilst dismissing the idea of automatic priority for women, noted that "...what is required is measures relating to the organisation of work, in particular working hours, and structures for small children and other measures which will enable family and work commitments to be reconciled with each other." He further noted, however, that following the ruling in *Commission of the European Communities v France*⁶⁵⁷ even these types of measures were not permitted by art 2(4).

⁶⁵⁶ C450/93, [1996] ICR 314

⁶⁵⁷ C312/86, [1988] ECR 6315

7.4.13 The case of *Commission of the European Communities v France* concerned rights which were given solely to mothers in connection with their caring responsibilities. Equivalent rights were not given to men and thus the CJEU held that this violated the principle of equal treatment. In this case, the Advocate General commented that "[a]s far as the Commission is concerned, equality could equally well be achieved by a levelling-up process applying the same benefits to men. In my view such an approach is in accordance with the terms and spirit of the directive, the third recital of which sets out the aim of furthering the harmonisation of living and working conditions 'while maintaining their improvement'."

7.4.14 The trend since the cases above, though, has been to find that positive discrimination measures are compliant with European law, so long as there is a need for the measure, it is proportionate and women do not get automatic preference. As Burrows and Robison have noted "...provided such measures are proportionate, European law allows a wide margin of appreciation to member states who wish to use positive action measures to provide specific advantages to women in order to assist them in pursuing a vocational activity or to prevent or compensate women for disadvantages in their professional careers"⁶⁵⁸. The advantage of limiting positive action in this way is that, as Idris⁶⁵⁹ has noted, due to intra-group inequality, imposing a blanket rule to achieve a numerical target without properly defining the scope of its application is unlikely to achieve equality because within that group, some will be disadvantaged more than others. This is particularly true in the context of parental rights – securing rights for mothers (and parents more generally) cannot always be achieved by simply providing rights to women, not least because not all women are mothers and so not all will be disadvantaged by the need to accommodate child-rearing and work.

7.4.15 There have been a number of cases considering positive discrimination, since the *France* case. The case of *Marschall v Land Nordrhein-Westfalen*⁶⁶⁰ concerned German law provisions in relation to the promotion of teachers. German law provided that, where

⁶⁵⁸ Noreen Burrows and Muriel Robison "Rethinking the value of preferential treatment", *UCL Juris Rev* 2009, 15, 45, 39

⁶⁵⁹ Mural Izza Idris "Rethinking the value of preferential treatment", *UCL Juris Rev* 2009, 15, 45-71

⁶⁶⁰ C409/95, [1998] 1 CMLR 547

there were two equally qualified candidates for promotion and there was a lower proportion of women in the relevant role, then the female candidate should be promoted unless reasons specific to the male candidate tilted the balance in his favour. The CJEU ruled that this could be permissible under article 2(4). (Interestingly, according to the judgement, the UK government's view was that this was not permissible under European law.)

7.4.16 *Badeck v Hessen*⁶⁶¹, which was determined after *Marschall*, concerned targets set by public administrations in relation to under-represented roles. These targets included that half of vacant positions should be filled by women. In addition, certain factors were to be taken into account in recruitment decisions, including that time spent looking after children should be taken into account if relevant for the position. The CJEU held that measures intended to give priority to women in areas where they were under-represented were permissible if, in situations where women and men were equally qualified, the measures did not give an automatic preference to female candidates, but instead took account of the specific situations of all candidates.

7.4.17 In *Abrahamsson v Fogelqvist*⁶⁶² the CJEU found that Swedish regulations gave women automatic preference and were not permissible. The regulations in dispute allowed universities to give preference to women for roles in which they were the under-represented sex so long as they met the minimum requirements for the relevant role (rather than being the best candidate or being equally qualified as the male candidates).

*Griesmar v Ministre de l'Economie, des Finances et de l'Industrie*⁶⁶³ concerned pension service credits that were paid to mothers (but not fathers) for each child that they had. The CJEU considered that this was a measure designed to protect women in their capacity as parents, rather than to alleviate any disadvantage related to childbirth/maternity leave, and, as both men and women can be parents and suffer disadvantage associated with this, this measure violated European law. *Griesmar* was followed by *Lommers*, in which, as set

⁶⁶¹ C158/97; [2001] 2 CMLR 6

⁶⁶² C407/98; [2000] ECR I-5539

⁶⁶³ C366/99; [2001] ECR I-9383

out above, the CJEU found that prioritising women and male single parents for nursery places was permissible.

7.4.18 For the reasons set out above, it would not appear that there is any prohibition under European law in providing additional rights to parents (irrespective of their sex) to eliminate the difficulties that they face in attempting to combine work and family responsibilities. As such, the next question to consider is how such a duty might operate.

7.4.19 My proposal for a duty to make reasonable accommodation of parental responsibilities would appear to be very similar to the duty to make reasonable adjustments for disabled workers under the EqA. As set out by the CJEU in *HK Danmark acting on behalf of Ring v Dansk almennyttigt Boligselskab*⁶⁶⁴, the concept of reasonable adjustment refers to the “...elimination of barriers that hinder the full and effective participation of disabled persons in work on an equal basis with others.” The aim of any requirement for employers to take account of childcare responsibilities and adapt the relevant worker’s working conditions would be to eliminate the barriers that prevent parents from participating in work on an equal basis with others. As such, the requirement that I am proposing seems to aim to achieve a similar outcome, albeit in respect of a group with a different protected characteristic. On this basis, it would be prudent to examine how the duty under the EqA in respect of disabled workers operates in order to determine whether a similar duty for parents would achieve the desired outcome. In addition there are some other jurisdictions, such as Canada, where a similar duty to accommodate parents’ responsibilities already exists. I will also consider the experience of this jurisdiction when evaluating whether my proposal would achieve the aim of enabling parents to better combine their work and family responsibilities.

Duty to make reasonable adjustments for disabled workers under the EqA

7.4.20 Under the EqA, where a PCP applied by or on behalf of an employer places a disabled person at a substantial disadvantage, as compared with those who are not disabled, there is a duty for that employer to take such steps as are reasonable (often referred to as reasonable adjustments) to prevent the PCP from having that effect. This

⁶⁶⁴ C335/11, [2013] 3 CMLR 21

duty will arise where an employer knows, or could reasonably be expected to know, that the employee has a disability and is likely to be placed at a substantial disadvantage.

PCP

7.4.21 PCP is not an unfamiliar term; it also appears in the definition of indirect discrimination. The Explanatory Notes to the EqA suggest that PCP was used in relation to the duty to make reasonable adjustments to ensure consistency of language across all the types of discrimination. The *Statutory Code of Practice – Employment*, when considering the definition of PCP in the context of reasonable adjustments, cross-refers to the discussion of PCP in the context of indirect discrimination. This suggests that PCP has the same meaning as it does under the test for indirect discrimination.

7.4.22 Examples of things that have been held to be PCP's in the context of the duty to make reasonable adjustments have included: shutting down access to email and internet for employees on long-term sickness absence⁶⁶⁵, insisting on face to face meetings at the employer's office in relation to formal attendance reviews⁶⁶⁶, a general requirement for consistent attendance at work⁶⁶⁷ and the application of an employer's sickness absence management procedure⁶⁶⁸. Given that this is consistent with the use of the term in indirect discrimination, which I considered in Chapter 5, I do not propose to further consider this here save to note that the definition of PCP is relatively wide and does not seem to unnecessarily narrow the scope of the types of action by employers which might fall within the remit of the duty to make reasonable adjustments.

Substantial disadvantage

7.4.23 In order for the duty to make reasonable adjustments to arise, the employer's PCP must place the disabled person at a *substantial* disadvantage as compared with people who are not disabled⁶⁶⁹. Section 212(1) of the EqA defines substantial as "more than minor or trivial". In *Hutchison 3G UK Ltd v Edwards*⁶⁷⁰ the EAT stated that there is not a sliding scale for this. If the disadvantage is not minor or trivial, then it is substantial. As noted

⁶⁶⁵ *Chawla v Hewlett Packard Ltd* (UKEAT/0280/13/BA)

⁶⁶⁶ *Chenembo v Lambeth LBC* [2014] EWCA Civ 1576

⁶⁶⁷ *General Dynamics Information Technology Ltd v Carranza* [2015] ICR 169

⁶⁶⁸ *Griffiths v Secretary of State for Work and Pensions* [2014] Eq LR 545

⁶⁶⁹ s20(3) EqA

⁶⁷⁰ [2014] EqLR 525

in *MM v Secretary of State for Work and Pensions*⁶⁷¹ this is not "a particularly high hurdle to establish substantial disadvantage." At least one commentator⁶⁷² criticised the DDA, which used the term "substantial disadvantage" in the same way as the EqA, for the high threshold required in order for the duty to operate. This seems to be due to a misunderstanding of what the term "substantial" means. As such the use of the term "substantial" appears to be a little misleading. One of the problems with the current regime of parental rights is that it can be inaccessible to those without specialist legal expertise, so there would seem to be some merit in considering whether this terminology is appropriate.

7.4.24 In addition, there is a comparative element to the test for when reasonable adjustments are required as the claimant must show that s/he is put at a disadvantage compared to those without the disability. The comparison exercise is different from that undertaken in direct discrimination claims; there is no requirement for the comparator's circumstances to not be materially different to those of the claimant. For example, in *Archibald v Fife*⁶⁷³, the employee became disabled and could not do her role as a road sweeper. Under a direct discrimination claim, the comparator would have been a person who was also not able to carry out his/her role. However, for the purpose of considering reasonable adjustments, the comparators in this case were other employees who are not disabled, who could carry out their roles and who were not liable to be dismissed on the ground of disability.

7.4.25 The comparison exercise can result in no adjustment being necessary because, although there is adverse treatment, this is not experienced solely by those with a disability. In *Griffiths v Secretary of State for Work and Pensions*⁶⁷⁴ the PCP (as pleaded) was the operation of the employer's sickness absence process. The Employment Tribunal ("ET") considered the Claimant's situation as compared to a person absent for the same period of time but not for a disability-related reason. There was no disadvantage

⁶⁷¹ [2013] EWCA Civ 1565

⁶⁷² Laurentia Truter 'Disability rights: employment developments in Britain'; 1996 *J S Afr L* 658 (1996)

⁶⁷³ [2004] UKHL 32

⁶⁷⁴ [2014] Eq LR 545

compared to non-disabled persons; both would equally have been disadvantaged because of having been absent from work. The choice of PCP in this regard would seem to be key as other cases, on similar facts, have produced the opposite result (that is, a finding that the claimant was at a substantial disadvantage) simply as a result of the pleaded PCP. *General Dynamics Information Technology Ltd v Carranza*⁶⁷⁵ concerned a similar fact pattern; the Claimant had been disadvantaged by the fact that he had been off sick. However in that case, the PCP that was pleaded was the requirement for constant attendance at work (rather than the application of the sickness absence process). The ET considered that this PCP did put the Claimant at a disadvantage compared to non-disabled persons. As such, the duty to make reasonable adjustments was triggered.

7.4.26 In *Smith v Churchill's Stairlifts*⁶⁷⁶, a case decided prior to *Griffiths* or *Carranza* the Claimant had lumbar spondylosis, which caused him not to be able to carry heavy objects. He was offered a role conditional upon him completing a sales course, which required him to carry a 25kg radiator cabinet. The employer withdrew the Claimant's place on the sales course, and effectively the job offer, on the basis that it (correctly) concluded that the Claimant would not be able to carry the sample radiator cabinet. At the ET hearing, the Claimant was given the opportunity to lift the sample but could not, however neither could any of the tribunal members. According to the ET, the comparator was the population generally who do not have any disability. It also concluded that the majority of the population would be likely to have difficulty carrying the cabinet. As such, the Claimant was not placed at substantial disadvantage. On appeal to the Court of Appeal, the question of whom was the comparator was decided differently. The Court of Appeal held that the comparator group was the other candidates who were susceptible to withdrawal of an offer because of the requirement to carry the cabinet. This was on the basis that the comparator should be identified by reference to the disadvantage that is caused by the relevant PCP. As the majority of the candidates could lift the sample, the

⁶⁷⁵ [2015] ICR 169

⁶⁷⁶ [2006] ICR 524

Claimant was placed at a substantial disadvantage in comparison with persons who were not disabled.

7.4.27 There appears to be a difficulty with the comparative exercise in some circumstances; as highlighted in *Carranza*, where the PCP puts everyone at a disadvantage, then it may not trigger the duty to make reasonable adjustments. In *Griffiths*, this difficulty was resolved by using a different PCP (the requirement for constant attendance at work, rather than the application of the employer's absence management process). For parents, most often the types of accommodation that are required will be for time away from the workplace (for example, in the form of absence or in the form of reduced hours) or a different type of working practice. In these circumstances, as discussed above, any disadvantage that is suffered is likely to be experienced equally by parents and non-parents who take time away. A comparative exercise in such circumstances may not result in a duty to accommodate parental responsibilities being triggered. Similar issues used to arise in relation to pregnancy/maternity and direct discrimination. These were resolved by changing the test for direct pregnancy/maternity discrimination from "less favourable" treatment (that is, a comparative exercise) to "unfavourable" treatment. That is not to say that there is not a need for a threshold to prevent a very minor disadvantage from triggering the duty to make reasonable adjustments; just that it should not be one that requires a comparative approach. The threshold could be formulated so that it is triggered once the worker is subject to a detriment that is more than trivial or minor and is caused by the employer's PCP.

Reasonable adjustments

7.4.28 There are two points to consider when looking at "reasonable adjustments" – first, what is an adjustment, and second, what is reasonable.

What is an adjustment

7.4.29 The EqA does not define the term "adjustment", nor does it contain a list of the types of thing that could constitute an adjustment. It seems to be that any step that an employer could take to alleviate the disadvantage caused by a PCP could potentially

constitute an adjustment. The crucial issue therefore becomes whether an adjustment is reasonable.

What is reasonable?

7.4.30 Unlike the Disability Discrimination Act 1995 (the “**DDA**”)⁶⁷⁷, the EqA does not set out a list of the factors which should be used to determine whether a particular adjustment would be reasonable. Instead the *Statutory Code of Practice – Employment* effectively replicates the list of factors. These include: whether taking any particular step would be effective in preventing the substantial disadvantage, the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer’s financial or other resources, the availability to the employer of financial or other assistance to help make the adjustment and the type and size of the employer.

7.4.31 It is for an ET to determine whether an adjustment is reasonable⁶⁷⁸. This means that an ET does not need to consider the thought process that was undertaken by the employer⁶⁷⁹. It is also an issue that is fact specific and so is for the ET to determine⁶⁸⁰ (rather than being a matter of law).

7.4.32 Notwithstanding the above, there may be occasions where no adjustments are possible. In *Dyer v London Ambulance*⁶⁸¹, the claimant had a life-threatening reaction to the use of aerosols and the application of strong perfume. The employer had no practicable way of ensuring that no-one used aerosols or applied perfume in the presence of the Claimant because she worked in a large open-plan area, which could also be accessed by members of the public. The ET found that this meant that there was no reasonable adjustment could be made.

7.4.33 Similarly, an adjustment is not reasonable if it would not alleviate the disadvantage caused by the PCP. In *Secretary of State for Work and Pensions v Wilson*⁶⁸² the PCP that applied was the redeployment of the Claimant. The Claimant argued that

⁶⁷⁷ Section 188

⁶⁷⁸ *Smith v Churchill Stairlifts* [2006] ICR 524

⁶⁷⁹ *Royal Bank of Scotland v Ashton* [2011] ICR 632

⁶⁸⁰ *Chief Constable of South Yorkshire v Jelic* [2010] IRLR 744

⁶⁸¹ UKEAT/0500/13/LA

⁶⁸² UKEAT/0289/09/DA

allowing her to work from home would be a reasonable adjustment. However, the evidence presented by the employer showed that it was not practicable to allow the Claimant to do so. As such, home working would not enable the Claimant to return to work as there was no work available for her to do at home and/or it was not feasible for her to do any work from home.

7.4.34 An adjustment is not unreasonable though simply because there is no certainty that it would alleviate the disadvantage, or that it might not be completely effective in doing so. In *Noor v Foreign & Commonwealth Office* the Claimant had dyslexia and dyspraxia. He responded to a job advert and attended an interview in respect of this. At interview he was asked questions to assess a competency not referred to on the advertisement (which had incorrectly listed the competencies required for the role). At first instance the ET found that no adjustment was required because the effect of such could not result in the claimant being successful in his application for the role because, even if he had received the highest score against the competency not mentioned in the advertisement, his other scores were lower than other candidates. The EAT disagreed; the Claimant had been disadvantaged in the interview and, as such, the adjustment, if any was required, was to remove that disadvantage. This did not mean that the Claimant had to show that with the adjustment he would have been successful in his application for the post, just that the disadvantage suffered (here his inability to deal with a line of unexpected, and from his perspective, unforeseeable, questioning) would have been ameliorated.

7.4.35 Similarly, in *Leeds Teaching Hospital NHS Trust v Foster*⁶⁸³ an ET (in a decision upheld by the EAT) held that there needs to be a prospect that adjustment will remove a disabled person's disadvantage, rather than a "good" prospect. In that case, the Claimant went off on sick leave due to stress and depression (which was, on the facts of this case, a disability) and was unable to return to the role in the security department that he had previously done due to his perception that he had been subject to bullying and harassment by his manager, although he was fit to return to a role elsewhere. He was

⁶⁸³ [2011] Eq L.R. 1075

subsequently dismissed on capability grounds (these being that he was unable to carry out his role in the security department) and argued that he should have been placed on the employer's redeployment register as soon as he was fit to return to work in January 2008 (rather than at a later date when the employer was considering dismissal). The employer argued that there were no facts to suggest that there would have been a real or good prospect of the claimant finding an alternative role by being placed on the redeployment register. The EAT held that the ET had to decide whether, in January 2008, there was a chance that a post suitable for the Claimant would have become available, not that there had to be a good prospect of the Claimant finding alternative employment. Given that the respondent employed a large number of people in the area, it was open for the ET to reach this conclusion.

Employer's knowledge

7.4.36 An employer must have knowledge of the worker's disability in order to be obliged to make reasonable adjustments. Under the EqA, the issue of employer's knowledge encompasses two points – (i) whether the employer knows of the disability (which I have dealt with above) and (ii) whether the employer knows that the disabled person is likely to be placed at a substantial disadvantage.

The Canadian experience

7.4.37 Canadian law includes a duty to accommodate parental responsibilities. This duty is found in the Canadian Human Rights Act ("CHRA"), which only directly applies to federal entities (and so is likely to be of limited use to private sector employees) and in provisionial/territorial legislation, which has developed through case law. The way in which the duty has been implemented varies across provinces but is based on the CHRA which contains a requirement to accommodate the needs of all individuals except where this "would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost"⁶⁸⁴. By way of example, the Manitoba human rights code defines discrimination as including a "failure to make reasonable accommodation for the special needs of any individual or group" where such arises as a

⁶⁸⁴ Section 15(2) of the CHRA

result of the equivalent of a protected characteristic⁶⁸⁵. By contrast, the right is not expressly stated in the Quebec Charter of Human Rights and Freedoms, but instead has been developed through case law⁶⁸⁶.

7.4.38 Although the duty to accommodate does not specify the steps that must be followed when considering whether an adjustment is required, case law has developed certain principles to be applied. The complainant must first establish that there is a *prima facie* case of discrimination. This involves showing that, as a result of his/her parental responsibilities and as a result of the employer's rules and practices, the complainant was unable to participate equally and fully in employment with the employer⁶⁸⁷.

7.4.39 The next stage is to apply the test established in *British Columbia (Public Service Employee Relations Comm) v BCGEU*⁶⁸⁸ to determine whether there has been the necessary accommodation. The burden of proof at this stage rests with the employer who must demonstrate that:

- (a) it adopted the particular disputed standard for a purpose rationally connected to the performance of the job;
- (b) it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
- (c) the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. Essentially this allows the employer to defeat the claim if it shows that the required accommodation would impose undue hardship on it. The factors taken into account include: the financial cost of the possible method of accommodation, the relative interchangeability of the workforce and facilities and the prospect of substantial interference with the rights of other employees⁶⁸⁹.

⁶⁸⁵ Section 9(1)(d)

⁶⁸⁶ *Ontario Human Rights Commission and O'Malley v Simpson Sears* [1985] 2 SCR 536

⁶⁸⁷ *Brown v. Canada (Department of National Revenue, Customs and Excise)* [1993] C.H.R.D. No. 7, *Johnstone v. Canada Border Services*, 2010 CHRT 20 (CanLII), 2010 CHRT 20

⁶⁸⁸ [1999] 3 SCR 3

⁶⁸⁹ *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489

7.4.40 Below I compare and contrast the duty to make reasonable adjustments under the DDA and the duty to accommodate the needs of the individual under Canadian law in order to identify how best to formulate any duty to accommodate childcare responsibilities.

7.4.41 The first stage under both the Canadian and UK tests is to show that the worker is disadvantaged by the employer's policy, practice or other workplace arrangements. Under the DDA though, the complainant must show that s/he is disadvantaged as compared to a worker without his/her disability. As set out above, there are some difficulties with a comparative approach in the parental rights sphere. On this basis, I would not propose adopting a comparative test for the proposed duty to make reasonable accommodation of parental responsibilities. Instead I propose that the duty is triggered after the worker establishes that the PCP results in them suffering a detriment.

7.4.42 The Canadian provisions are also different in a few important respects. The first is that, once a *prima facie* case has been established (that is, the claimant has shown that there is something that puts him/her at a disadvantage), the employer has first to show that the thing that is placing the claimant at a disadvantage is required "for a purpose rationally connected with the role". The advantage of the Canadian approach is that it requires employers to actively consider why they have particular requirements. This could be potentially very helpful in the area of parental rights in the workplace, where the normative standard of the ideal worker has been developed by taking account of the characteristics of a person without caring responsibilities. Requiring employers to consider why they have imposed particular PCP's (for example, why they require workers to work at particular times or at particular locations) could assist in changing these norms. By contrast, under the duty to make reasonable adjustments in UK law, once the claimant has established a *prima facie* case (that is, that s/he is disabled and that the employer's PCP puts him/her at a disadvantage), the court must look at whether an adjustment to that PCP would be reasonable. There is no obligation under the EqA for the court to consider why a particular PCP was adopted. Although there is no reason why this might not be considered in the question of whether an adjustment was

reasonable, this would seem to have less weight as it would be just one of many aspects that a court might consider.

7.4.43 The other significant difference between the Canadian duty and the UK duty is that Canadian law does not include a requirement for the employer to have knowledge of the protected characteristic. Knowledge is more likely to be an issue for disability rights than for those for parents, as workers may feel reluctant to disclose the fact that they suffer from a disability (perhaps through embarrassment, pride or some other reason), whereas there seems to be no such reason why a parent would not wish to inform their employer that they had a child. As such, many of the issues that arise in relation to the employer's knowledge of the worker's disability are likely not to be relevant to any duty to make adjustments for parental responsibilities. It would seem sensible that, in order for any duty to make reasonable adjustments for parental responsibilities to arise, the worker is required to inform his/her employer of the fact that s/he has a child. The other aspect to knowledge is a requirement that the employer knows, or ought to know, that the PCP places the worker at a disadvantage. Should a similar requirement apply in relation to parenting responsibilities? In short, the answer is yes, because each parent's circumstances may be different and an employer may not know of the particular needs of a particular worker to know that a particular PCP will result in that worker being subject to a detriment. However, as with the test for reasonable adjustments in respect of disabled workers, the test should include not just the employer's actual knowledge but what the employer should reasonably know. For most workers with "normal" (or average) childcare needs a reasonable employer should be able to anticipate what types of PCP might have an adverse impact on those with parental responsibilities. This approach would also mean that employers would need to think more generally about whether a particular policy might disadvantage parents and, if so, the reason that that policy is needed.

7.4.44 There is already, under GB law, a provision that could be seen to achieve this in the context of disability; the duty to make reasonable adjustments that applies to the provision of services, which is said to be an anticipatory duty. Unlike in the work sphere,

a service provider cannot wait until a disabled person tries to access a particular service before it considers reasonable adjustments, it must take steps, so far as reasonably practicable, to ensure that all disabled people can access its services⁶⁹⁰. As Lawson has noted "[t]hese anticipatory duties have a much greater potential to drive systemic change than does the reactive employment duty"⁶⁹¹. This is because, where the duty applies, the service provider must consider the accessibility of their services for disabled employees on a proactive basis, before any actual disadvantage has occurred, rather than simply in response to the needs of a particular individual. (Although until the point that an individual service user is subject to an actual difficulty, there will be no cause of action against the service provider.)

7.4.45 As Smith and Allen have noted "[t]he clear benefit of positive duties is that they move away from a fault-based, individualised conception of discrimination to an anticipatory, action-oriented capacity-based approach"⁶⁹². The anticipatory duty to make reasonable adjustments would seem to address the issue identified above that the employer should be required to consider whether any of its practices or policies might impact on those with parental responsibilities, in advance of any particular parent having a difficulty with a particular practice or policy. There would seem to be no reason why, if a duty to accommodate parental responsibilities were to be introduced, it could not be an anticipatory duty, rather than one which is only triggered at the point at which an employer's particular PCP puts a particular parent at a disadvantage.

An ongoing duty?

7.4.46 An ongoing duty would mean that, rather than the duty being extinguished by the employer taking a particular step to accommodate the worker's childcare needs (for example, allowing the worker to work part-time), the employer would be required to make any further accommodations (for example, time off work due to a child's school

⁶⁹⁰ Section 29(7) of EqA

⁶⁹¹ Anna Lawson, "Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated", 40 *Indus. L.J.* 359 (2011) at 369

⁶⁹² Belinda Smith, Dominique Allen "Whose Fault Is It: Asking the Right Question to Address Discrimination", 37 *Alternative L.J.* 31 2012

holidays) that the worker needed. This might reduce the need for parental leave and EDL (in respect of those emergencies involving a dependent child).

7.4.47 As has been noted in paragraph 3.2.6, one of the significant problems with the current regime of parental rights is the fact that there are some instances where parents require leave but their needs fall outside the remit of both parental leave and EDL. The classic example of this is the case where a parent knows of an impending disruption to childcare provision (and so is unable to use EDL) and either the employer postpones parental leave (as it is entitled to by up to six months) or refuses to allow the worker to take a single day as parental leave. In these circumstances the worker needs to take time off, but has no legal right to do so. A duty to accommodate a worker's childcare responsibilities might assist with this issue. As the duty would not be absolute (because the employer would only be required to make adjustments where it is reasonable to do so), there might still be occasions where a worker might not be permitted to take leave. It is worth considering here why there is an obligation to make "reasonable" adjustments, rather than a duty to make any adjustment required by the worker. As discussed in Chapter 1, for parental rights in the workplace to be workable, there must be a balance between the needs of workers and the needs of employers. If not, employers may try to avoid employing those that might be entitled to such a right; this would have a significant adverse impact on parents' ability to combine work and family. The duty that I am proposing is not dissimilar from the existing rights to parental leave and emergency dependent's leave, except that it allows the employer to look at a whole range of options for accommodating parent's needs, not simply by giving them time off. This should accommodate both employers' and workers' needs.

To whom should it apply?

7.4.48 Over recent years, there has been a shift in the coverage of parental rights in the workplace; previously many of the rights applied only to parents of young children. By way of example, when parental leave was introduced, it could only be taken in respect of a child aged five or under, whereas, from 5 April 2015, it can be taken for a child up to the age of 18.

7.4.49 As noted by Walsh, in her review of the flexible working provisions⁶⁹³, 16 years of age seems to be (legally) the age at which a child can be regarded as being old enough to look after himself/herself, although it should be noted that the amount of care that a child requires is likely to decrease as the child gets older. This means that the needs of parents are likely to change over time, rather than being fixed. This also supports the idea that there should be an ongoing duty. For the reasons above, the duty to make reasonable adjustments for parental responsibility should apply to all parents of children aged 16 or younger.

A separate duty or a type of discrimination?

7.4.50 It is important to note that, under the EqA, a failure to make reasonable adjustments is classed as being discrimination⁶⁹⁴. This means that in order to litigate a failure to make an adjustment, an employee would need to bring a claim for disability discrimination, rather than an action for breach of the duty *per se*. The advantage that this has is that any claim has the label of discrimination, which carries a certain amount of stigma for the employer against whom the claim is brought. This in turn is likely to lead employers to give careful consideration to any actions which might lead to a discrimination claim in order to avoid any potential negative publicity that might arise. For this reason I would advocate a failure to make reasonable adjustments for parents is a form of discrimination because of parental status.

7.5 Impact on existing legislation.

7.5.1 As set out above, if a duty to make reasonable adjustments were to exist for parents, there would be a reduced need for the right to parental leave or to EDL. However, these could not be abolished altogether, particularly as European law provides for parental leave of at least four months and requires that workers are entitled to time off from work on grounds of *force majeure* for urgent family reasons.

⁶⁹³ Imelda Walsh 'Flexible Working: A review of how to extend the right to request flexible working to parents of older children', May 2008

⁶⁹⁴ originally s5(2) "For the purposes of this Part, an employer also discriminates against a disabled person if – (a)he fails to comply with a section 6 duty imposed on him in relation to the disabled person" and s18B(12) - This section imposes duties only for the purpose of determining whether an employer has discriminated against a disabled person; and accordingly a breach of any such duty is not actionable as such.

7.6 Expanding the right to include all caring responsibilities

7.6.1 In Chapter 3 I concluded that, to the extent that rights for parents were justified on the basis of allowing or enabling parents to care for a child, such rights should be extended to all carers. The duty to make reasonable accommodation of parental responsibilities proposed above is needed for exactly this reason; as such, carers have a need for a similar duty.

7.6.2 In this thesis I have focused on the difficulties facing parents and I identified, in Chapter 6, a number of reasons why the discrimination protections contained in the EqA are not sufficient to protect parents. It was for this reason that above, I proposed that parental status should be a protected characteristic in its own right. Having not considered in depth whether the discrimination protections in the EqA are sufficient to protect carers it is difficult for me, within the scope of this thesis, to argue definitively for status as a carer to be a protected characteristic in its own right. However, to the extent that the same critique of discrimination law set out in Chapter 6 applies equally in respect of carers, there would seem good reason for protecting caring status more generally, rather than limiting protection to parental status.

CHAPTER 8 : Conclusion

8.1.1 In Chapter 1 I demonstrated that gender inequality in the work sphere remains a real issue which has not fully been addressed despite a raft of long standing legislative measures aimed at doing so, such as the Equal Pay Act 1970 and Sex Discrimination Act 1975 (now both subsumed into the EqA). This can be seen through the low level of female participation at board level and the persistence of the gender pay gap. In relation to the latter there is evidence that the difficulty in combining work and family directly contributed to the low level of remuneration that some women receive. There are clear reasons for state intervention to address the difficulties facing parents in the workplace, including economic reasons (increasing women's participation in the labour market could be worth up to £23bn to the economy⁶⁹⁵); social justice/gender equality reasons (the UK is ranked 60th in the world by the World Economic Forum in terms of equal pay and 71st for female participation in the workplace as professional and technical workers⁶⁹⁶); and the UK's obligations towards the European Union (which requires non-discrimination between men and women and the reconciliation of family and professional life).

8.1.2 In relation to parenting, I examined evidence which suggests that, whilst both parents are equally capable of caring for a child, the burden of this predominantly falls on women in a way that is often incompatible with full-time work⁶⁹⁷ with the difficulties with the norm discussed in Chapter 2⁶⁹⁸.

8.1.3 I argued that pregnancy and childcare are distinct concepts which should be dealt with separately. Pregnancy is a social good⁶⁹⁹ and, because only women are able to become pregnant, any detriment as a result of pregnancy is inevitably linked to gender. Parenting, on the other hand, can be done by either parent but tends to fall predominantly on women. In order to ensure gender equality, the workplace must be supportive of childcare responsibilities: this will enable both parents to take equal responsibility for childcare. Parenting is a crucial role for society and should be valued as such.

⁶⁹⁵ See paragraph 1.6.4

⁶⁹⁶ See paragraph 1.6.6

⁶⁹⁷ See section 1.2

⁶⁹⁸ See paragraphs 2.3.2 to 2.3.9

⁶⁹⁹ See paragraph 1.5.2

8.1.4 In Chapter 2, I examined in more detail the theoretical backdrop to the parental rights regime, looking at each of pregnancy and parenting separately. In relation to pregnancy and employees who might become pregnant, I concluded that any “special treatment” or exclusion of workers on the basis of potential reproductive harm should apply equally to men and women unless there was genuine evidence that the hazard applied only in relation to one sex⁷⁰⁰. The “equal treatment” approach does not seem to be useful in the pregnancy context given that the ability to become pregnant is a significant difference between men and women. The “special treatment” approach also does not seem to be helpful because of the way it has been used historically to exclude women from the workplace and the fact that it uses the male norm as the reference point⁷⁰¹. This means that pregnancy is strange – or different from “normal” – which is why “special” treatment is required. A better model would be to abandon the comparative approach and change the existing norm to ensure that women’s needs are incorporated. I concluded that, as pregnancy and parenting are separate concepts, the leave associated with a new baby should be divided accordingly⁷⁰². This would mean a short period of “maternity leave”, reserved exclusively for the mother, together with a longer period of “new child leave”, which either parent would be entitled to.

8.1.5 The problem in relation to childcare responsibilities is the way in which the norm of a worker has developed to be someone without any childcare (or other caring responsibilities). I concluded that an effective right to flexible working could assist parents, not just simply on an individual basis but also by requiring employers to look at their working practices and consider whether those that adversely impact parents are genuinely required. In this context I considered the use of a results-only work environment (“**ROWE**”)⁷⁰³. Whilst in theory this may sound desirable, it requires cultural change which is difficult to mandate through legislation, particularly as there are many workplaces where this model would not be viable. Finally in Chapter 2, I concluded that rights available to parents should, where these are necessary to facilitate caring

⁷⁰⁰ See paragraphs 2.5.24 to 2.5.28

⁷⁰¹ See paragraph 2.2.19

⁷⁰² See paragraphs 2.5.4 to 2.5.7

⁷⁰³ See paragraphs 2.5.10 and 2.5.11

responsibilities (as opposed to, for example, recovery from labour or bonding with a child) be extended more widely to carers.

8.1.6 In Chapters 3 to 5 I examined the current range of legislative provisions which might enable parents to combine their work and family responsibilities. I concluded that gender specific rights, such as maternity leave and paternity leave in their current form, perpetuate the idea that childcare/parenting should fall predominantly to the mother. Given that both parents are equally capable of caring for a child, this is undesirable. In the context of non-gender specific rights I concluded that, as a result of the piecemeal fashion in which rights have developed, there are often gaps in coverage which mean that parents' needs are not always met. Further, in respect of Shared Parental Leave, in particular, although this is ostensibly a gender-neutral right, in fact it perpetuates the idea that caring should first fall to mothers because a father's entitlement is conditional upon the mother's (both in terms of eligibility and the amount of maternity leave that the mother is prepared to surrender). The right to request flexible working had had some impact on parents' ability to combine work and family but, as it is a right to *request* flexible working, rather than a right to work flexibly, it is not robust enough to help in every case. The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provide some protection for part-time workers, but these only protect "part-time" workers and not those that work differently to "normal", for example, those working different hours or from a different location.

8.1.7 The existing discrimination provisions may assist some, but not all, parents. Due to the way in which childcare responsibilities disproportionately fall on women, the indirect sex discrimination provisions may be of use, although the unpredictability of the pool makes it difficult for potential claimants and respondents to have any degree of certainty of the outcome of litigation. Further, to the extent that childcare responsibilities become more evenly divided between parents, even female claimants will become unable to use the indirect sex discrimination provisions. The discrimination provisions were not designed to protect parents because parental status is not a protected characteristic.

8.1.8 There is a clear need for parents to be able to combine work and family. As set out above, the existing regime does not achieve this in part because many of the provisions which are relied on by parents were not designed to meet their needs (for example, the indirect sex discrimination provisions) and because the approach to these issues has been piecemeal (for example, the gap in coverage between EDL and parental leave). This is why it is important to start from scratch and redesign the regime for parents. The protection of pregnant workers is, on the whole, adequate so the focus should be on redesigning rights from the point at which a child is born.

8.1.9 One of the major issues is about shifting the emphasis on *mothers* caring to place it on *parents* caring. This requires gender neutral rights, such as my proposed “new child leave”. Equally the reliance on the sex discrimination provisions needs to be abandoned and replaced with specific protection for parents. As parents have particular needs, these must be accommodated. The existing rights attempt to do this but are insufficient. As such, I am proposing a duty to accommodate parental responsibilities similar to that under the EqA for disabled employees. However, there are some important differences. I am proposing that, where a PCP could result in a real detriment for those with parental responsibilities, the employer can only impose such a PCP if it is required for the a rational business reason and in such circumstance, the employer must make reasonable adjustments to prevent that unfavourable treatment. This differs from the duty to make reasonable adjustments for disabled workers in that it is an anticipatory duty, and there is no need for comparison with those without parental responsibilities. The need for an employer to show that there is a rational business reason for a PCP that would disadvantage those with parental responsibilities is based on similar provisions in Canadian law. As discussed at paragraph 7.4.42, a requirement for an employer to justify the imposition of a PCP that could disadvantage those with parental responsibilities could result in changes to workplace norms. As explained in Chapter 2, this is more desirable than, for example, special treatment, as it is more likely to secure fair treatment of parents.

8.1.10 This new duty to make reasonable adjustments would provide sufficient flexibility to meet the needs of parents, all of whom have unique and different

requirements dependent upon their particular circumstances, whilst also balancing the interests of employers, who may equally have diverse interests depending on their size, business model and various other factors. Once parents' needs are accommodated, this would remove any current hurdles to men participating more fully in childcare and active parenting, hopefully leading to a more equal distribution of such responsibilities and allowing women to take a greater role in the workplace if they so choose.

ANNEX 1: STATISTICS ON BIRTHS TO MOTHERS AGED 40 AND OVER

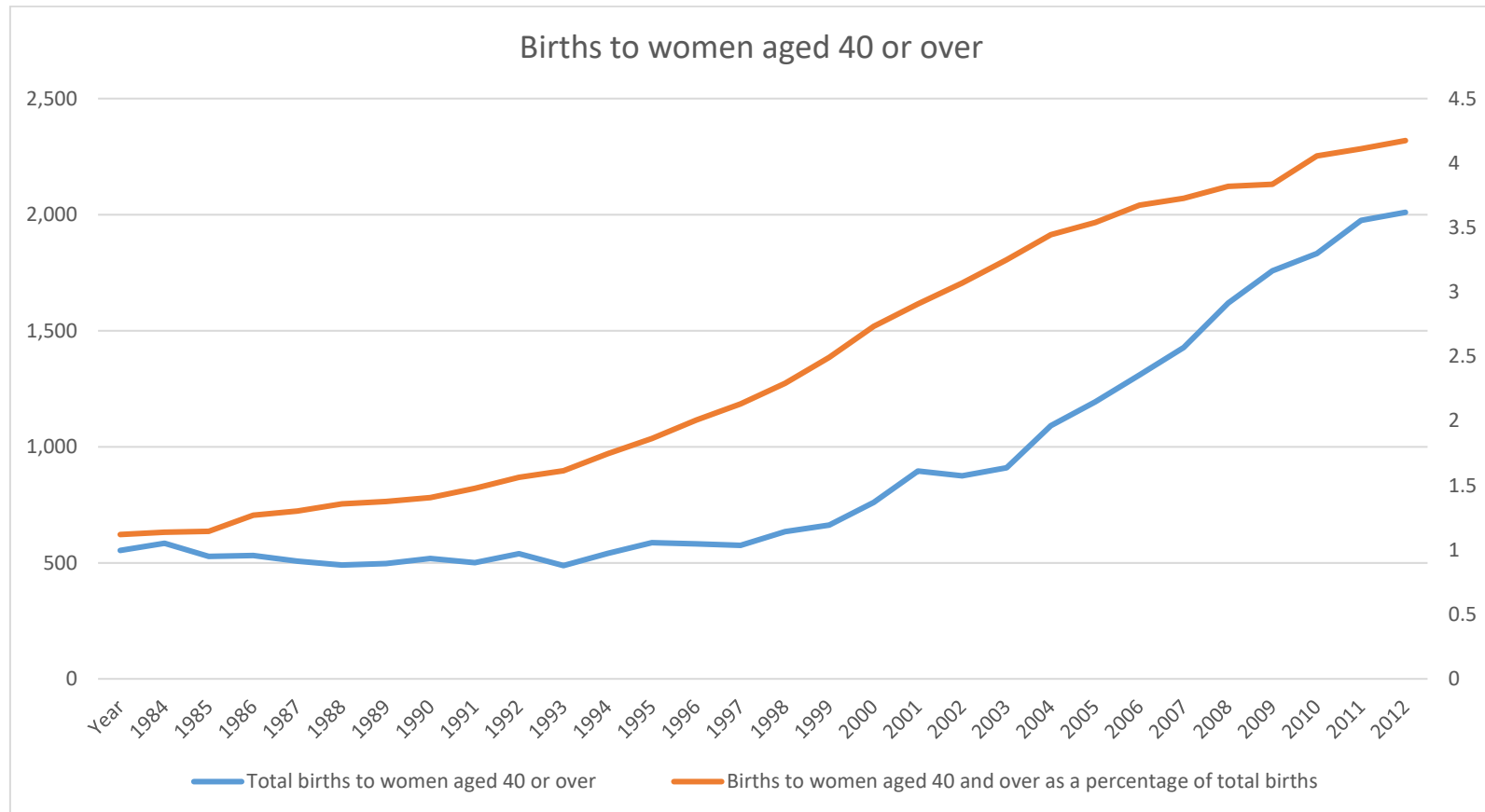


Table 1: Total births to women aged 40 and over

Year	Total births to women aged 40 or over
1984	553
1985	584
1986	528
1987	531
1988	507
1989	491
1990	497
1991	519
1992	501
1993	539

Year	Total births to women aged 40 or over
1994	488
1995	540
1996	587
1997	582
1998	575
1999	635
2000	663
2001	761
2002	895
2003	875

Year	Total births to women aged 40 or over
2004	909
2005	1,091
2006	1,194
2007	1,309
2008	1,428
2009	1,619
2010	1,758
2011	1,832
2012	1,975
2013	2,010

Table 2: Births to women aged 40 and over as a percentage of total births

Year	Births to women aged 40 and over as a percentage of total births
1984	1.119472125
1985	1.137386753
1986	1.143841771
1987	1.268211371
1988	1.301513747
1989	1.357519357
1990	1.376072733
1991	1.406573353
1992	1.478563226
1993	1.562808571

Year	Births to women aged 40 and over as a percentage of total births
1994	1.614048495
1995	1.746387343
1996	1.863476447
1997	2.008101447
1998	2.131621117
1999	2.29178995
2000	2.492550969
2001	2.734455144
2002	2.908129544
2003	3.070145092

Year	Births to women aged 40 and over as a percentage of total births
2004	3.250323188
2005	3.444533046
2006	3.540317293
2007	3.673843826
2008	3.727753626
2009	3.819621436
2010	3.834671202
2011	4.054354598
2012	4.110602817
2013	4.174301945

Statistics taken from ONS (Live Births in England and Wales by Characteristics of Mother 1, 2013, released 16 October 2014), available at <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcn%3A77-327586>

ANNEX 2: CALCULATION OF TIME SPENT ON CHILDCARE BY MEN AND WOMEN

Statistics

On average women spent 32 minutes per day caring for their own children, whereas men spend 15 minutes per day.

Those (both men and women) with dependent children aged up to four, spend 136 minutes per day caring for children and 76% of parents participate in this activity.

(All figures from The Time Use Survey⁷⁰⁴.)

Assumptions

The amount of time that is spent by women as compared to men is a static ratio (that is, there is no difference in the division of time spent on childcare for children of different ages).

The population is evenly divided (50:50) between men and women.

Calculations

The amount of time that women spend compared to men on childcare is 32:15.

This is a ratio of 2.13: 1

$$(2.13x + 1x) \div 2 = 136$$

$$2.13x + 1x = 136 * 2$$

$$2.13x + 1x = 272$$

$$3.13x = 272$$

$$x = 272 \div 3.13$$

$$x = 86.9$$

$$2.13x = 185.1$$

Conclusion

Women with dependent children aged up to four spend 185.1 minutes per day; men spend 86.9 minutes per day.

⁷⁰⁴ Deborah Lader, Sandra Short, Jonathan Gershuny, "The Time Use Survey: 2005", ONS, 31 August 2006

ANNEX 3 – TABLE OF REPORTED PTWR CASES

	Case name	Court	Claimant's sex	Summary of Case
1	Department of Constitutional Affairs v O'Brien ⁷⁰⁵	Supreme Court	Male	The Claimant was a part-time fee-paid judge. Whilst full time judges and salaried part-time judges were entitled to a pension on retirement, fee paid judges were not. The questions before the Supreme Court were whether the Claimant was a worker and, if so, whether the treatment of fee-paid judges was justified (the ECJ had previously ruled that if judges were workers, then the difference in treatment between full-time and part-time judges required objective justification).
2	Baxter v Titan Aviation Ltd ⁷⁰⁶	Employment Appeal Tribunal	Male	The Claimant had retired and was doing casual work as a driver. He was free to accept or decline any job (although in practice he rarely did the latter). The comparable full-time worker cited by the Claimant was not, for the purposes of the PtWR, comparable as he was employed on a different type of contract: the Claimant was a worker and the alleged comparator was an employee.
3	Komeng v Sandwell MBC ⁷⁰⁷	Employment Appeal Tribunal	Male	The Claimant was a care assistant (part-time covering evening shifts). The employer failed to provide the Claimant with the same training opportunities as full time comparator. The claim was remitted to the ET.

⁷⁰⁵ [2013] UKSC 6

⁷⁰⁶ UKEAT/0355/10

⁷⁰⁷ [2011] Eq. L.R. 1053

	Case name	Court	Claimant's sex	Summary of Case
4	Dorset County Council v Omenaca-Labarta ⁷⁰⁸	Employment Appeal Tribunal	Male	The Claimant had been employed on a full time fixed term contract, but at the contract's expiry, the only role that was available was a part-time fixed term position teaching ICT. The employer needed to reduce staffing costs so combined two subjects, ICT and Maths, into a single role. The Claimant's employment was terminated as a result. The employer selected the Claimant for termination, rather than considering terminating a full-time employee's employment and engaging the Claimant on a full-time basis. As such, this amounted to less favourable treatment.
5	Sharma v Manchester City Council ⁷⁰⁹	Employment Appeal Tribunal	Male	The lead Claimant was a part-time worker with the Manchester Adult Education Service. There were various different part-time arrangements operated by the Respondent; all but one claimant was employed on an arrangement whereby each year they were guaranteed to be given at least a third of the hours worked previously (this arrangement was referred to as established part-time). The employer had decreased staffing needs and decided to honour all contractual obligations first. This meant that established part-time workers received a third of previous year's hours. The EAT held that the term guaranteeing only a third of the previous year's hours constituted less favourable treatment under the PtWR. It did

⁷⁰⁸ UKEAT/0092/08

⁷⁰⁹[2008] I.C.R. 623

	Case name	Court	Claimant's sex	Summary of Case
				not matter that the employer also had some part-time workers who were entitled to a guaranteed number of hours each year.
6	Christie v Department for Constitutional Affairs ⁷¹⁰	Employment Appeal Tribunal	Male	The Claimant was a fee-paid part-time chairman of the National Insurance and Social Security Tribunals. The EAT held that not a worker within the meaning of the PtWR.
7	McMenemy v Capita Business Services Ltd ⁷¹¹	Court of Session	Male	The Claimant worked Wednesday to Fridays. Where a public holiday fell on a Monday, he did not receive any additional time off in lieu of that day's holiday. The Court of Session held that this did not amount to less favourable treatment on the basis of his part-time worker status.
8	Hudson v University of Oxford ⁷¹²	Court of Appeal	Male	The Claimant was employed on two part-time contracts – one of which was an academic role and the other a non academic one. The Claimant sought to argue that in reality he had one full time job, but that the employer had employed him on two contracts so that it could pay him at a lower rate in respect of the non-academic aspects of his single role.
9	Matthews v Kent and Medway Towns Fire Authority ⁷¹³	House of Lords	Male	The Claimants were retained fire fighters (fire fighters who commit themselves to regular weekly attendance of two to three hours for training and drill and to being on call for a set number of hours per week. By contrast “whole-timers”

⁷¹⁰ [2007] I.C.R. 1553

⁷¹¹ 2007 S.C. 492

⁷¹² [2007] EWCA Civ 336

⁷¹³ [2006] UKHL 8

	Case name	Court	Claimant's sex	Summary of Case
				worked a structured shift system of 42 hours per week, plus overtime. The pay arrangements reflected the difference in working arrangements – whole timers received a conventional salary and overtime payments; retained received a retaining fee, payments in respect of the regular drill/training and payments for being called out. The Claimants were complaining of less favourable treatment in respect of calculating sick pay (which was done differently from whole timers), a lower hourly rate for additional duties and their exclusion from the pension scheme.
10	R. (on the application of Manson) v Ministry of Defence ⁷¹⁴	Court of Appeal	Male	The Claimant was a major in the Territorial Army. He was denied a pension in respect of his service in the Territorial Army. The relevant issues were whether he was entitled to bring a claim under the PtWR or whether he was excluded from doing so by regulation 13(2)
11	Carl v University of Sheffield ⁷¹⁵	Employment Appeal Tribunal	Female	The Claimant was a part-time lecturer. She was not paid for preparation time, whereas her named comparator, who worked under a full-time University Teacher's contract was. In the alternative, she was treated less favourably than a hypothetical comparator employed on a full-time University Teacher's contract. The ET determined that there were significant differences between the work of the Claimant and that of the named comparator such that she was not a true

⁷¹⁴ [2005] EWCA Civ 1678

⁷¹⁵ [2009] 3 C.M.L.R. 21

	Case name	Court	Claimant's sex	Summary of Case
				comparator – and a hypothetical comparator not possible under PtWR, so the Claimant was unsuccessful.
12	Calder v Secretary of State for Work and Pensions ⁷¹⁶	Employment Appeal Tribunal	Female	The Claimant wanted time off to attend a health and safety course. Whilst the employer allowed her to attend, it refused to pay for her to attend if the course did not take place during her normal working hours.
13	NTL Group Ltd v Difolco ⁷¹⁷	Court of Appeal	Female	The Claimant was working part-time due to a disability. When there was a redundancy situation, the Claimant was pooled with one other employee and selected for redundancy. The employer attempted to find alternative employment for her – there was a full time role which matched some of the Claimant's skills but she was told that she would have to go through a selection exercise and might be able to carry out the role on a part time basis. The ET found that the way in which the selection criteria had been applied made it almost inevitable that the Claimant would be selected as a result of her disability and part-time status. Relevant criteria in respect of part-time status was her experience whilst at the Respondent – the ET held that this meant that a part-time worker with Claimant's length of service (less than two years at the point of the exercise) was likely to score less well than a full time worker employed in the position for a similar length of time.

⁷¹⁶ UKEAT/512/08

⁷¹⁷ [2006] EWCA Civ 1508

	Case name	Court	Claimant's sex	Summary of Case
14	Herbert Smith Solicitors v Langton ⁷¹⁸	Employment Appeal Tribunal	Female	The Claimant was working full-time and negotiated a part-time arrangement for her return to work after maternity leave (two days per week, plus 3.5 hours at home responding to emails/calls). For an interim period, she briefly worked full-time and then from May to September 2003, she worked part-time (four days per week). The employer pressurised her to increase her hours – the ET found that this was a detriment under the PtWR and that this was as a result of being a part-time worker. (In addition to a PtWR claim, the Claimant also brought an indirect discrimination claim.)
15	James v Great North Eastern Railways ⁷¹⁹	Employment Appeal Tribunal	Female	Full time workers worked an average of 40 hour week over an 8 week cycle. They were paid for the first 35 hours at basic rate – pay for the next 5 hours is paid at 1.25 times basic pay and was referred to as “additional hours”. Any hours in excess of the 40 hours per week was paid as overtime (also at 1.25 times basic pay). Part-time employees’ hours were also judged over the length of an 8 week cycle and they could be required to work overtime (paid at 1.25 times basic pay). There was no equivalent of the additional hours allowance. The EAT held that the additional hours allowance was not overtime and that a Tribunal would need to determine whether there was less favourable treatment by applying the pro rata principle.

⁷¹⁸ UKEAT/0242/05 and UKEAT/0437/05

⁷¹⁹ UKEAT/0496/04/SM

	Case name	Court	Claimant's sex	Summary of Case
16	Royal Mail Group Plc v Lynch ⁷²⁰	Employment Appeal Tribunal	Female	The Claimant applied for a full time position but because had previously worked part-time only appointed to new post on a temporary basis (issue, was whether the treatment was justified).
17	Hendrickson Europe Ltd v Pipe ⁷²¹	Employment Appeal Tribunal	Female	The employer wanted to reduce its number of staff. Her employer insisted that the Claimant's retention was dependent on her working full-time. She was then dismissed when she refused to become a full-time worker.
18	Tyson v Concurrent Systems Inc Ltd ⁷²²	Employment Appeal Tribunal	Female	As part of a restructuring (following a TUPE transfer), the Claimant was told that her role was being absorbed and was given the option of applying for the new role (which was full time) or taking voluntary redundancy. The alleged detriments were the dismissal, disconnection of the Claimant's ISDN line (which gave her access to the employer's database) and the reallocation of the Claimant's work to another employee. As the ET had failed to identify whether there was a comparable full-time worker, the case was referred back to the ET.

⁷²⁰ EAT/0426/03

⁷²¹ EAT/0272/02

⁷²² EAT/0028/03

	Case name	Court	Claimant's sex	Summary of Case
19	Grant v Pickering Interfaces Ltd ⁷²³	Employment Appeal Tribunal	Female	The Claimant was transferred to another employer (within the same group); she argued that the reason was as a result of her part-time worker status. The ET (and EAT) held that the reason for the transfer was due to a downturn.
20	England v Turnford School Governing Body ⁷²⁴	Employment Appeal Tribunal	Female	The Claimant worked part-time in the reception of the Respondent's school. The comparators that she sought to compare herself with were also part-time – so could not base a claim on their preferable treatment.
21	DR Simpson (Chilled Foods Ltd) v Stafford ⁷²⁵	Employment Appeal Tribunal	Female	The Claimant was working part-time as a result of childcare commitments. She had brought claims and sought to have the claim amended to bring claims under the PtWR as well as indirect sex discrimination claims. The EAT claims concerned whether the ET should have allowed the amendment.
22	Old Buckenham Park (Brettenham) Educational Trust Ltd (t/a Old Buckenham Hall (OBH)) v Parker ⁷²⁶	Employment Appeal Tribunal	Female	The Claimant was an art teacher. She was working part-time as a result of her disability. Although not formally appointed, she was effectively the Head of Art. The employer decided that it wished to appoint a Head of Art on a full time basis. The role was advertised and the Claimant applied for the role (despite being of the view that this was her current role).

⁷²³ EAT/1375/01

⁷²⁴ EAT/438/02

⁷²⁵ EAT/440/01

⁷²⁶ UKEAT/0110/09

	Case name	Court	Claimant's sex	Summary of Case
				When another individual was appointed to the role, the Claimant resigned, claiming that she had been constructively dismissed. The ET found that the reason that she was not appointed to the Head of Art role (and was thereby constructively dismissed) was because she was a part-time worker – and that this amounted to a breach of the PtWR. EAT upheld ET's decision.
23	Gibson v Scottish Ambulance Service ⁷²⁷	Employment Appeal Tribunal	Male	The Claimant was a part-time worker. He was required to work a higher proportion of standby hours than a full-time comparator. The ET held that the reason for the less favourable treatment was not because the Claimant was a part-time worker, and even if it had been, that it would have been objectively justified.
24	Ms C Short (Appeal No 2) v P J Hayman & Co Ltd ⁷²⁸	Employment Appeal Tribunal	Female	The Claimant worked part-time (four days per week) after her return from maternity leave. On a redundancy exercise, she was selected for redundancy and brought a claim alleging that the reason for her selection was because of her part-time status. The ET and the EAT found against the Claimant on the basis that there was no evidence to support her assertion. (The Claimant also brought an indirect sex discrimination claim.)

⁷²⁷ EATS/0052/04

⁷²⁸ UKEAT/0379/08/CEA

	Case name	Court	Claimant's sex	Summary of Case
25	McGrath v Ministry of Justice ⁷²⁹	Employment Appeal Tribunal	Male	The Claimant was a part-time judicial officer who was excluded from the judicial pension scheme.
26	Moultrie v Ministry of Justice ⁷³⁰	Employment Appeal Tribunal	2 male, 1 female	The Claimants were fee-paid medical members of Tribunals, who were not entitled to participate in a pension scheme.
27	Mulligan v Edinburgh University ⁷³¹	Employment Appeal Tribunal (Scotland)	Male	The Claimant was a part-time security officer. Full-time employees worked for continuous shifts, which entitled them to a 30 minute paid break. Whereas the Claimant worked the same amount of time but in 2 separate shifts so was not given a 30 minute paid break.

⁷²⁹ UKEAT/0247/14/LA

⁷³⁰ [2015] IRLR 264

⁷³¹ UKEATS/0007/14/SM

ANNEX 4: CASES WHERE COSTS AWARDED

This table sets out only cases where costs have been awarded/considered against a party to the proceedings. It does not include cases relating to wasted costs or where costs have been awarded in relation to review or EAT proceedings.

Abbreviations used:

ET – Employment Tribunal

EAT – EAT

PHR – Preliminary Hearing

<i>Costs Not Awarded</i>			
<i>No Costs Warning Given</i>			
Name	Court	Factors considered	Costs award decision overturned
Adecco UK Ltd v Aldwinkle ⁷³²	EAT	N/A	Yes; a costs award should have been made as the Claimant had conducted the proceedings unreasonably. After his lawyers ceased to act for him, the Claimant did not respond to any letters from the Respondent, did not comply with case management directions, did not reply to ET's request for information and did not notify ET or Respondent that he was not going to attend the hearing.

⁷³² [2013] ICR D10

AQ Ltd v Holden ⁷³³	EAT	ET did not consider claim to have been misconceived or proceedings to have been unreasonably conducted. (Appeal to EAT was by Respondent on basis that costs award should have been made.)	No.
Iqbal v Metropolitan Police Service ⁷³⁴	EAT	After substantial costs application made by Respondent (when it stated that if Claimant withdrew before live evidence started, it would not pursue him for costs), the following day the Claimant sought an adjournment claiming that suffering from stress. ET refused.	No costs award; ET's decision not to allow adjournment overturned.
Addaction v Cheema ⁷³⁵	EAT	Refused application for costs. Disability discrimination may have been misconceived but no additional work to defend claim as significant overlap between this and race discrimination claim.	Appeal dismissed.
Daleside Nursing Home Ltd v Mathew ⁷³⁶	EAT	Dismissed application for costs. ET found that the claim had been based on a deliberate and cynical lie. The decision on costs was because the Claimants were unrepresented and genuinely believed that they had a claim, even though they were wrong Stark contrast between this and earlier reference in ET judgement to claim being based on a lie.	EAT found that the decision was perverse. Unreasonable remitted to ET to determine amount of costs award.

⁷³³ UKEAT/0021/12

⁷³⁴ "The start of the hearing is a particularly sensitive and difficult time for a possible future application for substantial costs to be raised; we think that discussion of such a matter in open Tribunal at that point, particularly where a Claimant is representing himself and has a history of depression, is usually best avoided." UKEAT/0186/12

⁷³⁵ UKEAT/0087/11

⁷³⁶ UKEAT/0519/08

Davidson v John Calder (Publishers) ⁷³⁷	EAT	Unfair dismissal claim. The Claimant applied for costs, but application was refused on the basis that the order for compensation sufficiently reflected the ET's view of the employer's conduct.	Appeal upheld - remitted to ET for reconsideration. ET should have considered whether conduct of ER proceedings was unreasonable in order to reach determination; costs issues are separate and distinct from those relating to compensation.
ET Marler Limited v Robertson ⁷³⁸ NB - different legislation ⁷³⁹	National Industrial Relations Court	N/A Appeal by employer against the decision not to make a costs award.	No
Governors of St Andrew's Catholic Primary School v Blundell ⁷⁴⁰	EAT	N/A Respondent appealing against decision not to make a costs award.	No
HCA International Ltd v May-Bheemul ⁷⁴¹	EAT	N/A Appeal against decision not to make a costs award	No
Henry Wiggins & Co v Jenkins ⁷⁴²	EAT	Costs not awarded because the Claimant was penniless and in prison.	Appeal dismissed - ET exercised discretion correctly.

⁷³⁷ [1985] I.C.R. 143

⁷³⁸ [1974] ICR 72

⁷³⁹ rule 13(1) of the Schedule to the Industrial Tribunals (Industrial Relations, etc.) Regulations 1972 1 required that tribunals should only award costs where a party had acted frivolously or vexatiously

⁷⁴⁰ UKEAT/0259/12

⁷⁴¹ UKEAT/0477/10

⁷⁴² [1981] C.L.Y. 837

Lemonious v Church Commissioners ⁷⁴³	EAT	<p>N/A</p> <p>ET found that proceedings not conducted unreasonably but noted that they believed that the Claimant had been untruthful in relation to a central plank of his claim.</p>	No. Appeal in relation to costs dismissed. Although ET had made finding that Claimant had not been truthful, this alone did not necessarily amount to unreasonable conduct of the proceedings.
Nicolson Highlandwear Ltd v Nicolson ⁷⁴⁴	EAT (Scotland)	<p>Proceedings not conducted unreasonably – the Claimant not legally represented, genuinely believed he had a strong case of unfair dismissal. Although the Claimant had lied to the Respondent, he had not lied to the ET. Claimants are entitled to bring unfair dismissal claims for the purpose of seeking a bare declaration of unfair dismissal.</p>	<p>Yes – should be an award of expenses – case remitted to an ET to consider the amount.</p> <p>ET had taken into account the Respondent’s conduct (rather than just the Claimant’s) as well as other irrelevant factors. Claimants were not entitled to bring unfair dismissal claims purely to receive a declaration of unfair dismissal.</p>
Onyx Financial Advisors Ltd v Shah ⁷⁴⁵	EAT	<p>The Claimant lost his claims for constructive unfair dismissal, whistleblowing detriment and holiday pay because he had fraudulently misrepresented his employment history, had affirmed the contract and had then attempted to blackmail the Respondent. However, there were some findings of inappropriate behaviour of the Respondent’s management. The ET refused to list a</p>	<p>Yes; the ET should have listed a costs hearing or have accepted written submissions from the parties on the issue of costs. Remitted to the ET.</p>

⁷⁴³ UKEAT/0253/12

⁷⁴⁴ [2010] I.R.L.R. 859

⁷⁴⁵ UKEAT/0109/14

		costs hearing and refused the Respondent's costs application.	
PFMS Ltd (t/a A&A Cleaning Specialists) v Fleet ⁷⁴⁶	EAT	ET had indicated would have a hearing on issue then determined outcome.	Remitted to ET.
Saiger v North Cumbria Acute Hospitals NHS Trust ⁷⁴⁷	EAT	Not satisfied that one side had acted vexatiously or unreasonably.	No.
Scott v Inland Revenue Commissioners ⁷⁴⁸	EAT	ET held that the conduct of the case had been reasonable, so not appropriate to award costs.	No.
Taiwo v Olaigbe ⁷⁴⁹	EAT	Appeal - costs not awarded to successful Claimant as she had not incurred them herself (represented by law centre)	Matter remitted to ET to consider whether costs should be awarded.
Walker v Heathrow Refuelling Services Co Limited ⁷⁵⁰	EAT	N/A	Yes. Costs of £500 in respect of wasted costs of adjournment. The Claimant had sought an adjournment. The Respondent did not oppose on basis that costs were paid. Adjournment was only necessary because of unwarranted joining of

⁷⁴⁶ UKEAT/0850/03

⁷⁴⁷ UKEAT/0325/10

⁷⁴⁸ UKEAT/0068/03

⁷⁴⁹ [2013] I.C.R. 770

⁷⁵⁰ UKEAT/0366/04

			respondents and late addition of disability discrimination claim.
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<i>Costs Not Awarded</i>			
<i>Costs Warning Given</i>			
Name	Court	Factors considered	Costs award decision overturned
Adese v Coral Racing Limited ⁷⁵¹	EAT	N/A	N/A
Dean & Dean Solicitors v Dionissiou-Moussaoui (Costs) ⁷⁵²	Court of Appeal	ET dismissed application for costs.	Appeal dismissed.
Gammon v Stoke Mandeville Hospital NHS Trust ⁷⁵³	EAT	N/A Settlement sum in excess of what could expect to recover.	No.
Marshall v Law Centres Federation ⁷⁵⁴	EAT	N/A	N/A
Npower Yorkshire Ltd v Daly ⁷⁵⁵	EAT	Appeal against decision not to make a costs order in circumstances where claim struck out by the ET as being misconceived, the Claimant had previously been warned by the ET about his claim being misconceived	Yes – the fact that the Claimant genuinely believed he had a claim at the start of proceedings does not mean that costs should not be ordered. Remitted to ET to re-consider.

⁷⁵¹ UKEAT/0760/04

⁷⁵² [2011] EWCA Civ 1332

⁷⁵³ UKEAT/0563/03

⁷⁵⁴ EAT/186/00

⁷⁵⁵ UKEAT/0842/04

<i>Costs Not Awarded</i>			
<i>Costs Warning Given</i>			
Name	Court	Factors considered	Costs award decision overturned
		and the Claimant knew that he was not employed by the Respondent.	
Shaw v Cedar Tree Hotel ⁷⁵⁶	EAT	No details given.	Appeal concerned only substitution of the Respondent, not costs.

⁷⁵⁶ UKEAT/0425/12

<i>Costs Award Made</i>				
<i>No Costs Warning</i>				
Name	Court	Costs award made	Factors considered	Costs award decision overturned
Agbodo v Hertfordshire CC ⁷⁵⁷	EAT	£10,000	Claim was misconceived – it had no possible chance of success.	No.
Baskaran v IMTECH Traffic ⁷⁵⁸	EAT	£10,000	Claim was misconceived and Claimant acted vexatiously and unreasonably. During cross-examination, the Claimant (who was unrepresented but had brought previous claims) did not suggest to any of the witnesses that they had discriminated against him. The Claimant failed to discharge burden of proof and adduce evidence from which the ET could conclude that the Respondent had committed an act of discrimination.	In part; amount only.
Cook v Building Research Establishment Ltd ⁷⁵⁹	EAT	£10,000	Redundancy claim withdrawn during hearing after ET informed unrepresented Claimant that would make findings of fact that would be binding in relation to any	Yes.

⁷⁵⁷ UKEAT/0243/09

⁷⁵⁸ UKEAT/0018/13

⁷⁵⁹ UKEAT/0493/12

			County Court claim brought in respect of contractual redundancy pay (which was worth £195,000).	
Fariba v Pfizer Ltd ⁷⁶⁰	EAT	Costs to be assessed	<p>PHR on 20 March 2010 considering strike out of proceedings</p> <p>Litigation conducted in a wholly unreasonable way.</p>	Judgement deferred pending Court of Appeal decision in <i>Barnsley Metropolitan Borough Council v Yerrakalva</i> .
Graham v University College London Hospitals NHS Foundation Trust ⁷⁶¹	EAT	£1,500	Claims misconceived. The Claimant knew or ought to have known that claim hopeless. The Claimant was unrepresented.	<p>Set aside because irrelevant considerations taken into account.</p> <p>EAT set aside the decision. The Claimant was not represented, the claims were found to be hopeless, but subjectively excusable for the Claimant to carry on.</p>

⁷⁶⁰ UKEAT/0605/10

⁷⁶¹ UKEAT/0130/13

Growcott v Glaze Auto Parts Limited ⁷⁶²	EAT	£1,972.50	Unreasonably pursued after 14 June 2000 – letter set out reasons why claim was misconceived.	No.
Hillingdon LBC v Meek ⁷⁶³	EAT	£2,322.42 (Employer)	Costs threat made by the employer should never have been made and constituted unreasonable conduct. Unreasonable conduct in the handling of the case through a failure by the employer to inform the employee of a vital piece of evidence.	Yes.
Lambeth LBC v D'Souza (No.4) ⁷⁶⁴	EAT	£3,000	The proceedings were misconceived. The Claimant had at least 13 years of ET litigation experience. The claim was one that no competent lawyer would have advised to pursue.	Yes; when claims were brought, it was not possible to award costs against an individual on the basis of a claim being misconceived.
Lake v Acro Grating ⁷⁶⁵	EAT	£7,500	After costs warning given, a further £24,041.15 costs was incurred. The Claimant acted unreasonably in pursuing after offer on 18 March 2004 not to pursue claim against him.	Yes – overturned on basis that failure to accept an offer cannot in itself constitute unreasonable

⁷⁶² UKEAT/0419/11

⁷⁶³ UKEAT/0422/03

⁷⁶⁴ EAT/0395/99, EAT/0023/00, EAT/0466/02. Part of the case was appealed to the Court of Appeal (*Lambeth LBC v D'Souza (No.4)* [2003] EWCA Civ 1709) but this did not relate to the costs award against the Claimant.

⁷⁶⁵ UKEAT/0511/04

				action in pursuing claim.
Lodwick v Southwark London Borough Council ⁷⁶⁶	Court of Appeal	£4,000	Unreasonable conduct; the case had been significantly extended by the conduct of the Claimant.	Order quashed – ET failed to quantify what costs had been incurred by the Claimant’s “unreasonable conduct”.
Noor v Home Office (Border and Immigration Agency) ⁷⁶⁷	EAT	£500	Misconceived disability discrimination claim; the ET ruled at preliminary hearing that Claimant not disabled. The ET warned that needed to produce evidence and the Claimant failed to do so. Two costs warning from the Respondent	No.
Nouchin v Norfolk CC ⁷⁶⁸	EAT	In excess of £180,000 subject to assessment	25 day hearing on 8 day withdrew claims (24/11/2010) Vexatious, misconceived and abusive - invented and lied about having complained about racist behaviour and this deceit formed the basis of his case.	Appeal dismissed.
Peat v Birmingham City Council ⁷⁶⁹	EAT	No details of quantum.	ET awarded costs against the Claimants on the basis that that they acted unreasonably in the conduct of the case by pursuing it after receipt of costs warning letter and claims were misconceived.	EAT upheld ET decision.

⁷⁶⁶ [2004] EWCA Civ 306

⁷⁶⁷ UKEAT/0252/08

⁷⁶⁸ UKEAT/0240/12

⁷⁶⁹ UKEAT/0503/11

Power v Panasonic (UK) Limited ⁷⁷⁰	EAT	£10,000 (against successful claimant)	Claimant's schedule of loss unrealistic; if had engaged in meaningful negotiations, could have avoided the need for a 7 day hearing.	No; appeal dismissed.
Salinas v Bear Stearns International Holdings Inc ⁷⁷¹	EAT	£120,000 subject to assessment	Claim misconceived and proceedings conducted unreasonably: many of the incidents complained about either did not happen or not in the way alleged; the Claimant was put on notice by the Respondent regarding conduct of proceedings and the Claimant was represented.	No.
Raggett v John Lewis plc ⁷⁷²	EAT	£2,655.72	The bringing of unfair dismissal claim was misconceived. The Claimant accepted that there had been misuse of company discount card and that this was in breach of company policy. No appeal against award of costs, just quantum.	In part; costs award should not have included VAT.
Raveneau v London Borough of Brent ⁷⁷³	EAT	£500	The Claimant had not made a rational attempt at the outset of the case to define relevant issues, so time wasted on irrelevancies.	Yes. There was no evidence to support finding that bringing and conduct of case was unreasonable. The hearing lasted for 9 days; ET had scheduled for 10 –

⁷⁷⁰ UKEAT/0439/04

⁷⁷¹ [2005] ICR 1117

⁷⁷² [2012] IRLR 906

⁷⁷³ UKEAT/1175/96

				so case completed within allotted time span.
Sharma v London Borough of Ealing ⁷⁷⁴	EAT	£113,000 (subject to assessment)	The claim was misconceived; the Claimant knew that the allegations were false or alternatively without obvious merit. Further, the bringing of proceedings was vexatious; the Claimant was dishonest and deceitful.	No.
Shields Automotive Limited v Greig ⁷⁷⁵	EAT	£4,000	ET concluded that the Claimant had lied under oath – on this basis, the conduct of the proceedings was unreasonable	Yes; appeal by employer regarding the ET's failure to consider the employee's capital. The employee was ordered to pay the whole of expenses (£21,460.20) as taxed on a party-party basis by the Auditor of the Sheriff Court.
Towu v Lewisham Hospital NHS Trust ⁷⁷⁶	EAT	£10,000	The claim had no prospect of success; the Claimant had no evidence to support the claim. Further, the proceedings had been conducted unreasonably; the Claimant failed to	No

⁷⁷⁴ UKEAT/0399/05

⁷⁷⁵ UKEAT/0024/10

⁷⁷⁶ UKEAT/0314/05

			give properly particularised schedule of loss and failed to provide witness statement until the last moment. The witness statement contained new allegations not previously raised, which only one individual could answer and the Claimant knew when preparing the statement that this individual could not attend the hearing.	
Turning Point Scotland v Perry ⁷⁷⁷	EAT (Scotland)	Appeal to EAT about failure to award expenses	Claimant brought National Minimum Wage claim and then withdrew the claim after requests for schedule of loss and further information. ET did not consider that it was competent to make expense order given withdrawn but not dismissed. It noted that even if it was competent, could not hold misconceived or unreasonably conducted – and stated that this is a complex area of law in flux.	EAT; claims misconceived and unreasonably conducted. Remitted to ET to consider quantum of expenses award Court of Session - ET decision reinstated.
Vaughan v Lewisham LBC ⁷⁷⁸	EAT	Yes – one third costs to be assessed (estimated to be £260,000)	Claims misconceived - unsustainable and unreasonably advanced; the Claimant's interpretation and perception of events was illogical or unreasonable. The Claimant could not explain why responses that had been given to her complaints (during the grievance process) were not accepted.	No; appeal dismissed.

⁷⁷⁷ UKEATS/0049/11

⁷⁷⁸ [2013] I.R.L.R. 713

Weir v Consult Marine Ltd ⁷⁷⁹	EAT	£500 against Claimant, who was successful in wrongful dismissal claim	Successful at liability hearing, separate remedy hearing scheduled. In the interim period, the Respondent offered to pay sum that it calculated to be due. The Claimant declined the offer on the basis that she wanted an apology and because she disagreed with amount. Costs warning from the Respondent - sum ultimately awarded by the ET was the same as the sum offered by Respondent.	Appeal also on amount awarded by ET. As the Claimant was successful in part, it could not be said that no reason for the Claimant not to have accepted the Respondent's offer.
Wolff v Kingston upon Hull City Council ⁷⁸⁰	EAT	£1,721 against Claimant	Costs warning by the Respondent in May 2007. The Claimant should have accepted offer of £1,000 - nearly twice what was recovered at tribunal.	Appeal dismissed.

⁷⁷⁹ UKEAT/0623/03

⁷⁸⁰ UKEAT/0631/06

<i>Costs Award Made</i>				
<i>No Reference to Costs Warning</i>				
Name	Court	Costs award made	Factors considered	Costs award decision overturned
Anderson v Cheltenham and Gloucester Plc ⁷⁸¹	EAT	£10,000 against Claimant	Costs awarded on the basis that Claimant failed to beat Calderbank offer of £25,000 (recovered £18,073.75).	Set aside by the EAT; the rejection of an offer alone did not amount to unreasonable conduct and no indication that the ET believed the claim was misconceived
Andorful v Hammersmith and Fulham LBC ⁷⁸²	EAT	£10,000	The claim had no reasonable prospect of success and strike out successful.	Reduced to £5,000 - means were only partly taken into account (did not take into account the fact that the Claimant was on maternity leave so was receiving reduced pay).
Andrew v Eden College ⁷⁸³	EAT	£3,944	Not stated in judgement.	Yes; quantum to be reconsidered as ET had included time spent at hearing which is not

⁷⁸¹ UKEAT/0221/13

⁷⁸² UKEAT/0410/11

⁷⁸³ UKEAT/0438/10

				permissible in respect of preparation time orders.
Aramark Ltd v Graham ⁷⁸⁴	EAT	£7,500 to Claimant	The Respondent had acted unreasonably in conducting proceedings – it should have been clear after exchange of witness statements that no reasonable prospect of success and the Respondent behaved unreasonably between liability and remedies hearing by failing to negotiate with the Claimant (Claimant tried on five occasions and no substantive response on any).	No.
Arrowsmith v Nottingham Trent University ⁷⁸⁵	Court of Appeal	£3,000	Unreasonable conduct - claim based on a series of facts that the ET found not to be true.	Appeal dismissed.
Ayobiojo v Lambeth LBC ⁷⁸⁶	EAT	£2,000	The Claimant had behaved unreasonably in failing to attend a hearing after her application for postponement was denied.	No
Baker v Tote Bookmakers Ltd (t/a Totesport) ⁷⁸⁷	EAT	75% of total costs (120,000 subject to assessment)	Advanced allegations in support of conspiracy theory and discrimination which he knew or ought to have known were untrue. Parts of evidence were untruthful.	Appeal dismissed.

⁷⁸⁴ UKEAT/0164/12

⁷⁸⁵ [2011] EWCA Civ 797

⁷⁸⁶ EAT/0510/02

⁷⁸⁷ UKEAT/538/11

Barnsley Metropolitan Borough Council v Yerrakalva ⁷⁸⁸	Court of Appeal	£92,500 (subject to assessment) Set aside by EAT	The Claimant withdrew her claims. The ET felt that she had been untruthful at a PHR in relation to the state of her health, her personal injury claim and her financial means.	Yes. By EAT (in full). Court of Appeal held that ET had jurisdiction to make a costs order, but was wrong on quantum – appropriate costs award was 50% of the Respondent's costs.
Beat v Devon County Council ⁷⁸⁹	EAT	£10,000	The claim was misconceived and in some areas unreasonably conducted.	In part; reduced to £5,000.
Bell v Lancaster City Council ⁷⁹⁰	EAT	£200 ⁷⁹¹	The Claimant failed to attend a re-scheduled hearing (which had been postponed at his request) and then withdrew his claim	No.
Ben-Edigbe v Nuffield Hospital ⁷⁹²	EAT	£250	Hearing day wasted as the Claimant's representative had failed to identify the issues in the case.	Not appealed (appeal on different issues but costs referred to).

⁷⁸⁸ [2012] IRLR 78

⁷⁸⁹ UKEAT/0534/05

⁷⁹⁰ EAT/1380/98

⁷⁹¹ ET makes reference to maximum that could award being £500

⁷⁹² EAT/302/99

Benjamin v Interlacing Ribbon ⁷⁹³	EAT	£5,000	Bringing of the claim misconceived. Principle element of the Claimant's claim was that the Respondent had failed to address her grievance. This was wrong as a matter of fact. Claimant was, at all material times, advised.	Substantive issues of case remitted to ET for consideration (so issues on costs to be reconsidered after decision on substantive issues).
Beynon v Scadden ⁷⁹⁴	EAT	Costs to be assessed	The Claimants' trade union supported the claim and knew or should have known that the claim had no reasonable prospect of success. The claims had been pursued with a collateral purpose in mind (the recognition of the trade union).	No.
Boras Topic v Hollyland Pitta Bakery ⁷⁹⁵	EAT	£64,936 (subject to assessment)	The claim was misconceived; there was a total lack of evidence to support claims. The Claimant had not raised a grievance or attended meetings to discuss issues, even when invited to do so (although the Claimant had a genuine belief in claims.) Unreasonable conduct. The Claimant was able to pay (owned two properties).	No.
Bouheniche v Secretary of State	EAT	£2,000 by Claimant to Respondent	Claimant successful and awarded £7,000 in respect of race discrimination.	No.

⁷⁹³ UKEAT/0363/05

⁷⁹⁴ [1999] IRLR 700

⁷⁹⁵ UKEAT/0523/11

for Work and Pensions ⁷⁹⁶			Claimed to have lodged a grievance on claim form but had not, so claim could not be brought (statutory grievance procedure in place at the relevant time of the alleged race discrimination).	
Bryant (t/a Bryant Hamilton & Co) v Weir ⁷⁹⁷	EAT	£750 in favour of Respondent; Respondent appealed on basis should have been more.	Various claims but bulk of ET time spent dealing with unfair dismissal and breach of contract; the ET found these claims misconceived. The letter which Claimant sought to rely on as constructively dismissing her was reasonably written and there was no basis on which to maintain that it amounted to a breach of contract. However, it was not unreasonable conduct simply as a result of a failure to consider a reasonable settlement offer.	No reasons as to why £750 right amount Order for referral back to ET.
Carr v Allen Bradley Electronics Ltd ⁷⁹⁸	EAT	Full costs (subject to assessment)	Frivolous and vexatious unfair dismissal claim; the Claimant was not a credible witness, no prospect of success.	Appeal - quantum should have been £50, should not have taken account of trade union's means just because the Claimant had been assisted by the trade union.

⁷⁹⁶ UKEATPA/0559/11

⁷⁹⁷ UKEAT/0253/04

⁷⁹⁸ [1980] I.C.R. 603

Cartiers Superfoods v Laws ⁷⁹⁹	EAT	Award against Respondent. Costs to be assessed	Unfair dismissal. Had the employer investigated the matter at the commencement of claim, it would have known that it had no defence. Threatened employee with a suit for damages if sought legal assistance after dismissal.	Appeal dismissed.
Castlemilk Group Practice v Chakrabarti ⁸⁰⁰	EAT (Scotland)	Wasted costs in respect of a day and a half's hearing (against Respondent)	Adjournment had been sought by Respondent on third day of hearing. Deliberate and consistent failure to adhere to the case management orders of the ET.	Not appeal in relation to costs order.
Clark v Clark Construction Initiatives Ltd ⁸⁰¹	EAT	£1,750	Claim relating to whistleblowing was misconceived.	Remitted to tribunal to determine quantum.
Cooper v Smith ⁸⁰²	EAT	£5,000 in favour of Claimant	Unreasonable conduct of proceedings - failed to enter a notice of appearance but attempted to intervene in proceedings. Not obvious that whole of costs incurred were as a result of Respondent's unreasonable conduct.	Remitted to ET.

⁷⁹⁹ [1978] IRLR 315

⁸⁰⁰ UKEATS/0065/08

⁸⁰¹ UKEAT/0225/07

⁸⁰² UKEAT/0452/03

Cooper v Weatherwise (Roofing and Walling) Limited ⁸⁰³	EAT	£4,000	Late hour at which adjournment application made. Contacted the Respondent at 2pm the day before the hearing and made application at 4.15pm that day. On day of the hearing, neither the Claimants nor their representatives attended.	Yes – quantum – award was in excess of amounts incurred as a result of the adjournment (remitted to another ET for consideration)
Corus UK Ltd v Young ⁸⁰⁴	EAT	Costs awarded £1,220.68	One of tribunal members recognised a manager who attended the ET proceedings as an observer from the Respondent. Application for recusal of member made on day two. Application unopposed. The Claimant applied for costs in relation to aborted hearing.	Costs award set aside - no fault of the Respondent, ET member should have brought connection to ET chairman's attention.
Criddle v Epcot Leisure Ltd ⁸⁰⁵	EAT	£1,786	Employee had failed to comply with ET's directions and orders.	Yes; set aside. The ET had considered whether it could make a costs award, but not whether it should.
Deman v London Business School ⁸⁰⁶	EAT	Costs against Claimant.	Unreasonable conduct of proceedings. The Claimant made an application for adjournment on basis that the Respondent had failed to comply with case management orders. The Claimant failed to attend hearing. Application to adjourn by Claimant (unwell and out of	Overtaken - failed to take account of Respondent's conduct. Had Claimant attended, would have likely sought postponement on basis of

⁸⁰³ [1993] ICR 81

⁸⁰⁴ UKEAT/0114/05

⁸⁰⁵ UKEAT/0275/05 and 0276/05/

⁸⁰⁶ EAT/0357/99

			country so unable to travel - medical evidence confirmed unwell but did not state unfit to attend).	Respondent's failure to adhere to orders and grounds for costs award against Respondent. Respondent had failed to provide Claimant with bundle in advance as per order. On day of hearing produced 900 page bundle.
Deman v Victoria University of Manchester ⁸⁰⁷	EAT	£8,000 plus reimburse Secretary of State in respect of allowances paid to two people to attend proceedings	Four days of ET time wasted by applications and interruptions. Failure to produce medical evidence that had been ordered to produce.	Appeal dismissed.
Dhariwal v London Borough of Greenwich ⁸⁰⁸	EAT	80% of assessed costs, subject to a cap of £18,000	Claim misconceived. Claimant did not accept reasonable settlement offer.	No.

⁸⁰⁷ EAT/1375/98

⁸⁰⁸ EAT/276/96

Doyle v North West London Hospitals NHS Trust ⁸⁰⁹	EAT	£95,000 (subject to assessment)	Bringing of claim misconceived and unreasonable.	In part; quantum of award to be reconsidered as the ET had failed to consider the Claimant's ability to pay.
Drysdale v Department of Transport (Maritime and Coastguard Agency) ⁸¹⁰	EAT	£1,050	Reasons not sought for costs (so not clear on what basis awarded).	No
Duncan v Ministry of Defence ⁸¹¹	EAT	£1,440	ET found that claim had no reasonable prospect of success so awarded costs. EAT upheld points on appeal, so overturned costs decision (on the basis that it could no longer be said that the claim had no reasonable prospect of success).	Yes.
Dyer v Secretary of State for Employment ⁸¹²	EAT	£450	Unreasonable conduct of proceedings in relation to the way in which disclosure was conducted.	No.

⁸⁰⁹ [2012] ICR D21

⁸¹⁰ UKEAT/0171/12

⁸¹¹ UKEAT/0191/14

⁸¹² UKEAT/0183/83

Essien v JJ Joyce & Son Ltd ⁸¹³	EAT	£4,000 by Claimant	Successful in relation to unfair dismissal, holiday pay, unauthorised deductions Failed to explain how £4,000 related to unreasonable conduct of Claimant.	Remitted to ET for reconsideration.
Flint v Coventry University ⁸¹⁴	EAT	£9,000	The ET decided that it was relevant to take into account the Claimant's ability to pay, but then failed to take into account the fact that the Claimant had a history of low-paid temporary roles, with periods of unemployment.	Yes; the ET had failed to take into account relevant matters or had reached a perverse conclusion.
Francois v Castle Rock Properties Ltd (t/a Electric Ballroom) ⁸¹⁵	EAT	£250 (Claimant successful)	Unreasonable conduct of representative.	Yes
Gardiner v VAW Motorcast ⁸¹⁶	EAT	£100 by each Claimant	ET failed to specify how the Claimants had been unreasonable in persisting with claim. Deposit order.	Overturned.

⁸¹³ UKEAT/0137/06

⁸¹⁴ [2015] ICR D1

⁸¹⁵ UKEAT/0260/10

⁸¹⁶ EAT/0262/00

Ghosh v Nokia Siemens Networks UK Ltd ⁸¹⁷	EAT	£5,000	Unreasonable conduct. Failed to establish any less favourable treatment. Testimony inconsistent with witness statement.	Appeal dismissed
Godfrey Morgan Solicitors Ltd v Marzan ⁸¹⁸	EAT	£433.30 preparation costs order	Costs award against the Respondent. Unreasonable conduct of the defence; the Respondent denied that the Claimant was an employee; it had two legal entities one without word "Ltd" in its title, one with, Ltd had been employer and the claim did not include "Ltd" in the name of the Respondent. The Respondent tried to rely on this to argue no jurisdiction to hear claim, which resulted in an adjournment being needed. ET found that a counter claim that was brought was brought only to intimidate the Claimant. An aggravating factor was the fact that the Respondent was a firm of solicitors so duty to the court.	Appeal dismissed
Health Development Agency v Parish ⁸¹⁹	EAT	£8,519 against Respondent to Claimant	The Claimant had asked for reasons for dismissal - request refused so had to lodge claim, response to claim still did not set out rationale for dismissal.	Appeal successful in part; ET could not award costs incurred prior to commencement of proceedings.

⁸¹⁷ UKEAT/0125/12

⁸¹⁸ UKEAT/0465/11, UKEAT/0466/11, UKEAT/0467/11, UKEAT/0468/11, UKEAT/0575/11

⁸¹⁹ [2004] I.R.L.R. 550

				Remitted to ET to consider amount of costs attributable to unreasonable conduct.
Hemming v British Waterways Board ⁸²⁰	EAT	£10,000	Claimant did not attend first day of hearing – ET informed that she had been taken by ambulance and was in A&E. Husband could not comply with ET's requirement that medical corroboration of claim be received by 2pm.	Yes – order of costs of £1,200 to be paid by the Claimant.
Hickling (t/a Imperial Day Nursery) v Marshall ⁸²¹	EAT	£862.15 (Employer)	Unreasonable to resist TUPE claim. EAT held that employer could not, on the basis of available information, have appreciated the fact that the basis of their resistance to the claim was bound to fail.	Yes.
Home Office v Morris ⁸²²	EAT	Approximately £20,000	Unreasonable conduct by the Claimant - intimidation of witnesses. Unrepresented.	No appeal against award of costs.

⁸²⁰ UKEAT/0102/13

⁸²¹ UKEAT/0217/10

⁸²² UKEAT/0799/04, UKEAT/0800/04, UKEAT/0801/04, UKEAT/0860/04

Hosie v North Ayrshire Leisure Ltd ⁸²³	EAT	Award as taxed.	Sex discrimination claim. Proceedings misconceived; failure to properly consider claims prior to commencement by representatives.	Appeal allowed and costs decision quashed. The ET had not properly considered test for proceedings being misconceived; there was no discussion of prospects of success and the conduct of the representative irrelevant for purpose of this test.
J&R Farragher (t/a Potens) v Davies ⁸²⁴	EAT	£17,000 to Claimant against Respondent	Respondent's defence misconceived but the ET did not explain why.	EAT allowed appeal; it was not clear why the ET thought misconceived. Remitted to the same ET to reconsider costs issue.
Jackson v East Sussex CC ⁸²⁵	EAT	£500	Race discrimination. Unrepresented Claimant but had brought previous proceedings against same employer with trade union assistance	Appeal allowed - insufficient reasons given for costs award

⁸²³ EATS/0013/03

⁸²⁴ UKEAT/0249/08 and UKEAT/0250/08

⁸²⁵ EAT/1377/99

			Must have been apparent to the Claimant that there was no evidence of race discrimination.	
Jilley v Birmingham and Solihull Mental Health NHS Trust ⁸²⁶	EAT	£65,000 (subject to assessment)	Unreasonable conduct – Claimant failed to serve her witness statement, despite extensions and failure caused cost and loss of hearing time. One complaint not made in good faith. Further, the Claimant changed her evidence. The claim was malicious and vexatious and the ET found that the Claimant had fabricated the allegations. Monthly income of £1,500 plus capital of, at most, £40,000.	In part (quantum); the ET had failed to take account of the Claimant's ability to pay.
Johnson (Colin) (t/a Richard Andrew Ladie's Hairstylists) v Baxter ⁸²⁷	EAT	£250.	Costs in favour of the Claimant. The ET found that the Respondent had acted unreasonably. Appeal on the basis that the application for costs was not made within a reasonable time.	Appeal dismissed. Reasonable for the Claimant to wait until appeal about amount of compensation had been dealt with.

⁸²⁶ UKEAT/0584/06 and 0155/07

⁸²⁷ [1984] I.C.R. 675

Jones v Rotherham MBC ⁸²⁸	EAT	Over £4,000 against the Claimant	The Claimant failed to prepare a witness statement and this meant that an adjournment was necessary. The Respondent had been ready to exchange statements.	No.
Jones v Standard Life Employee Services Ltd (Costs) ⁸²⁹	EAT (Scotland)	£880	Application for an adjournment of hearing on a Monday, made at 4.55pm the previous Friday.	No.
Kapoor v Barnhill Community High School Governors ⁸³⁰	EAT	£8,900	The ET considered that the Claimant had put forward false evidence. Whilst the Claimant was unrepresented, the ET noted that she had supported an earlier discrimination claim by her brother.	Yes; remitted to another ET. The fact of false testimony alone is not sufficient to mean that the proceedings have been conducted unreasonably.
Keane v Investigo ⁸³¹	EAT	Amount not specified	The Claimant made applications for jobs in which had no interest and applied for these in order to make money out of discrimination claims. The Claimant had brought claims against 21 other respondents.	No.
Keskar v Governors of All	EAT	£4,000 against the Claimant	Race discrimination with virtually no evidence to support the claim.	No.

⁸²⁸ UKEAT/0441/04

⁸²⁹ UKEATS/0034/13

⁸³⁰ UKEAT/0352/13

⁸³¹ UKEAT/0389/09

Saints Church of England School ⁸³²				
Kew College Limited v Parsley ⁸³³	EAT	£62,337 (subject to assessment) less £31,874.16 covered by family household insurance (against employer)	Response to proceedings misconceived. The Respondent acted unreasonably in resisting the claim. There was no reasonable prospect of success; evidence in hands of the Respondent showed that this clearly was a constructive dismissal situation (there had been a campaign of conduct orchestrated with a view to ensuring that the Claimant left)	No.
Khan v Vignette Europe Ltd ⁸³⁴	EAT	£1,500	Costs on an adjournment. PHR on whether the Claimant had lodged a grievance. The Claimant failed to bring a copy of the grievance that was intending to rely upon to the hearing, causing the adjournment.	Yes – the Claimant could not have known that disclosure had been postponed. The grievance would have been within the Respondent's disclosure documents.
Kopel v Safeway Stores Plc ⁸³⁵	EAT	£5,000	Settlement offer rejected out of hand; refusal to engage in meaningful settlement negotiations. Claim in relation to Human Rights Act seriously misconceived	No

⁸³² [1991] I.C.R. 493

⁸³³ UKEAT/0565/06

⁸³⁴ UKEAT/0350/08

⁸³⁵ EAT/0281/02

Kotecha v Insurety Plc (t/a Capital Healthcare) ⁸³⁶	EAT	£10,000	Claimant acted vexatiously and had not been honest with the ET; disregarded ET's directions; attempted to mislead the ET; attempted to blow out of all proportion any perceived failing on the parts of the respondent. Unrepresented.	No
Kovacs v Queen Mary and Westfield College ⁸³⁷	Court of Appeal (Civil Division)	£500	The Claimant frequently and repeatedly made outrageous allegations against professional people employed or engaged by the Respondent. None of the allegations were proven before the ET.	No.
Ladbroke Racing Ltd v Hickey ⁸³⁸ (Previous ET rules)	EAT	£150	The Respondent provided the Claimant with a large bundle of documents not previously disclosed; an adjournment was required so the Claimant could review the documents.	No. No need for the conduct of proceedings to have been frivolous or vexatious where it relates to adjournment.
Lanzante (t/a Hair UK) v Jefferies ⁸³⁹	EAT	Amount not specified	Costs award against the Respondent of costs from the date of liability hearing. The Claimant put forward a proposal for settlement, which was less than the ET ultimately awarded.	Appeal dismissed.

⁸³⁶ UKEAT/0461/07

⁸³⁷ [2002] EWCA Civ 352

⁸³⁸ [1979] I.C.R. 525

⁸³⁹ EAT/0702/01

Larwood v Earth Tronics Inc Ltd ⁸⁴⁰	EAT	£595 against the Claimant.	Failure to instruct solicitors resulted in a late application to amend claim.	Appeal allowed. It was not unreasonable to instruct a solicitor after proceedings commenced.
Lewald-Jeziarska v Solicitors in Law ⁸⁴¹	EAT	Costs of the entire proceedings.	The Claimant had acted unreasonably throughout and the claims were misconceived. The Claimant was successful in relation to four of eight claims brought.	Remitted to ET to reconsider.
Lochgorm Warehouses v Gordon ⁸⁴²	EAT	£500 against the Claimant.	Costs awarded for want of prosecution and delay. The ET refused to assess costs on the basis that the Claimant did not appear and it therefore had no submissions on means. As such, it ordered £500, being the maximum that the ET could order at that time without assessment. Appeal on amount of order by the Respondent.	Appeal successful. The ET did not have to consider means, the unreasonable conduct of the Claimant had caused the Respondent unnecessary expense. Costs to be assessed.
Lothian Health Board v Johnstone ⁸⁴³	EAT	50% of the employee's costs	The Respondent knew or should have known that its defence could not be run by the second day of the hearing.	Not frivolous conduct; costs award overturned.

⁸⁴⁰ EAT/0558/03

⁸⁴¹ UKEAT/0165/06

⁸⁴² EAT/1223/00

⁸⁴³ [1981] I.R.L.R. 321

NB - Previous tribunal rules (Industrial Tribunals (Labour Relations) Regulations 1974) – test was frivolous conduct				
Marriott Motor Group v Cottington ⁸⁴⁴	EAT	£1,498.89	One of the Respondent's witnesses was not available. The Respondent had a signed copy of the witness' statement and was prepared to rely on this but the Claimant wanted to cross examine. The hearing was adjourned so that the witness could give live evidence. Case management order only required exchange of statements; it did not require witnesses to give live evidence. Since the Respondent was content to rely on statement, the adjournment was not truly caused by it.	Yes, costs decision overturned.
McKinney v Newham LBC ⁸⁴⁵	EAT	£7,750	Constructive dismissal claim brought – but clear that there was a dismissal by the	No.

⁸⁴⁴ UKEAT/0319/08, UKEAT/0320/08

⁸⁴⁵ UKEAT/0501/13

			Respondent. Unreasonable conduct of proceedings.	
McPherson v BNP Paribas (No.1) ⁸⁴⁶	Court of Appeal	£90,747.82 subject to assessment	Unreasonable conduct of proceedings – the Claimant had withdrawn ostensibly on medical grounds; the Claimant had previously sought an adjournment on medical grounds and there was evidence that, at time the Claimant sought the adjournment, would not be fit to go through full hearing.	In part; on quantum. Unreasonable conduct started with application to adjourn; costs should only be awarded that were incurred after this point.
Meadowstone (Derbyshire) Ltd v Kirk ⁸⁴⁷	EAT	Amount not specified	Proceedings conducted vexatiously and unreasonably. The defence misconceived The Respondent was not candid about reason for the Claimant's dismissal and its defence was based on a lie.	Appeal dismissed.
Mirikwe v Wilson & Co Solicitors ⁸⁴⁸	EAT	Respondent's costs on indemnity basis.	Outrageous way in which the proceedings had been conducted.	No.
Monaghan v Close Thornton Solicitors ⁸⁴⁹	EAT	£500 (employee to bear) in relation to	The Claimant was successful on unfair dismissal claim but not disability discrimination aspects. The Claimant had	Yes – rejection of offer did not make the conduct of proceedings unreasonable in circumstances where

⁸⁴⁶ [2004] IRLR 558

⁸⁴⁷ UKEAT/0529/05

⁸⁴⁸ UKEAT/0025/11

⁸⁴⁹ UKEAT/0003/01

		remedy hearing.	rejected an offer of £1,500; the ET ultimately awarded £1,007.	received £1,007 and offer was £1,500.
Myers v Dunlop Latex Foam Ltd ⁸⁵⁰	EAT	£3,600	The Claimant's case was in part misconceived and had been conducted unreasonably. Once the medical evidence was in the hands of the Claimant's representative, it should have been clear that this case, in respect of the disability claim, was misconceived, and that the prospect of the Claimant succeeding in an unfair dismissal claim – or at least succeeding to any material degree resulting in a financial award – must be slim.	No.
NCP Services Ltd v Topliss ⁸⁵¹	EAT	£3,000	The Respondent acted unreasonably in resisting the claim: it should have recognised that it had failed to comply with the statutory disciplinary procedure and therefore should not have resisted the claim of ordinary, unfair dismissal. Further it persisted in arguing that the DVLA had requested the Claimant be removed from the contract where that was not the case.	Yes – failure to comply with the statutory disciplinary procedure was dealt with through 20% uplift and there was some evidence that an individual at the DVLA had requested that the Claimant be removed from the contract.

⁸⁵⁰ UKEAT/0752/04

⁸⁵¹ UKEAT/0147/09

Newton v Alcohol East ⁸⁵²	EAT	Entire costs subject to detailed assessment	The Claimant failed to attend hearing and contacted ACAS at last minute to try to negotiate a settlement.	Yes – only costs incurred in relation to Claimant’s non-attendance at hearing (£500).
O'Driscoll v Hertfordshire Personal Assistance Support Service ⁸⁵³	EAT	£10,000	The Claimant was unreasonable in her conduct, the claim was misconceived and there was no credibility in any of the Claimant's allegations.	No.
Olatunji v Network Rail Infrastructure Ltd ⁸⁵⁴	EAT	£10,000	Failing to adhere to orders of the ET; no further reasons given.	On appeal, order set aside and costs award of £750 made.
Omar v Worldwide News Inc (t/a United Press International) ⁸⁵⁵	EAT	Costs to be assessed	The Claimant had, in bringing or conducting the proceedings, acted frivolously, vexatiously or otherwise unreasonably. This matter could have been concluded far sooner if the issues had been defined more clearly. The ET found that the Claimant fabricated his evidence in many respects.	Yes; the ET’s criticism was of the Claimant’s representative conduct.

⁸⁵² EAT/707/01

⁸⁵³ UKEAT/0412/09

⁸⁵⁴ UKEAT/0553/11

⁸⁵⁵ [1998] I.R.L.R. 291

Oni v NHS Leicester City ⁸⁵⁶	EAT	Costs to be assessed – anticipated to be very substantial	Unreasonable conduct of proceeding due to the unsatisfactory way in which the Claimant gave evidence. The ET found the Claimant not to be a credible witness as refused to answer questions.	Yes. Section on conduct of proceedings in judgement on merits was unnecessary – the wording echoed that of the threshold tests for grant of an order of costs and expressed concluded views on this – real possibility that ET had pre-judged the question of costs. Remitted to ET for consideration.
Osonnaya v Queen Mary University of London ⁸⁵⁷	EAT	£500	Applied for postponement on the day of PHR when circumstances giving rise to postponement known earlier to the Claimant.	No.
Pantry v Home Office ⁸⁵⁸	EAT	£423	The ET awarded costs of £423 on basis that the claim had no reasonable prospect. Application for review – Chairman decided that there would be a review. Three person panel upheld original decision. Costs warning had been given to the Claimant.	EAT overturned – Chairman had determined that claim had reasonable prospect (or would not have proceeded to three person panel) – inconsistent to award costs

⁸⁵⁶ UKEAT/0144/12

⁸⁵⁷ UKEAT/0225/11

⁸⁵⁸ UKEAT/0083/04

				on basis that claim had no reasonable prospect.
Phelan v Rolls Royce plc ⁸⁵⁹	EAT	£10,000	Not stated.	Appeal not regarding costs issue.
Pinnock v Birmingham City Council ⁸⁶⁰	EAT	£4,050	Discussion of costs on 10 September at CMD, hearing to take place on 11 September. Postponement needed because of the Claimant's refusal to exchange witness statements.	Remitted to the ET to consider the issue of ability to pay.
Purohit v Hospira (UK) Ltd ⁸⁶¹	EAT	In region of £8,000	Misconceived and conduct unreasonable; the Claimant had placed a great deal of emphasis placed on a diary which the Claimant knew not to be contemporaneous .	Appeal allowed for the ET to consider means only
Ramsay v Bowercross Construction Ltd ⁸⁶²	EAT	£10,000 (against Claimants)	Claim against Bowercross misconceived; the Claimant should have known that Bowercross was not the employer.	Allowed in part – as solicitor did not have a practising certificate, could only give a preparation time order- only fees after 18 July 2006 (when Bowercross informed Claimant that it had never employed him).

⁸⁵⁹ UKEAT/0106/14

⁸⁶⁰ UKEAT/0185/13

⁸⁶¹ UKEAT/0297/11

⁸⁶² UKEAT/0534/07

Rajguru v Top Order Ltd ⁸⁶³	EAT	Amount not specified.	Unfair dismissal. The Respondent raised two new allegations against the Claimant and the Claimant needed an adjournment to consider these. The adjournment was granted but the Claimant was ordered to pay the cost of a day's attendance for the Respondent on the basis that the Claimant should have sought further and better particulars from the Respondent.	Appeal upheld.
Richmond v Devon Doctors on Call ⁸⁶⁴	EAT	£4,000	Unreasonable conduct of proceedings; important aspects of preparation were not undertaken promptly in accordance with ET instructions plus there was a delay in obtaining medical evidence.	In part; amount to be reconsidered (on the basis that no explanation of why the ET believed £4,000 to be the appropriate award).
Roadbeach Ltd v Werner ⁸⁶⁵	EAT	£3,000 (Er to ee)	The Respondent failed to respond to claim, but attended a remedy hearing. The hearing was adjourned and the Respondent filed a defence. The ET awarded costs occasioned by adjournment (£1,500) but also a further £1,500 on account of unreasonable conduct	Yes, in respect of quantum (reduced to £1,500).
Saminaden v Barnet Enfield and	EAT	Just under £4,000	Misconceived and conduct unreasonable.	Yes. ET's decision on merits was perverse.

⁸⁶³ [1978] I.C.R. 565

⁸⁶⁴ UKEAT/0314/06

⁸⁶⁵ UKEAT/0304/07

Haringey NHS Trust ⁸⁶⁶				
Scott v Russell ⁸⁶⁷	Court of Appeal	Whole cost of proceedings	Failure to follow case management directions, no credible evidence to back up primary facts of the Claimant's case, persistently using irrelevant evidence in an attempt to discredit the Respondent. Litigant in person.	Permission to appeal refused.
Seel Garages v Byrne ⁸⁶⁸	EAT	Yes in favour of Secretary of State	Award of costs against the Respondent to the Secretary of State respect of wasted ET time caused by an adjournment on application of the Respondent.	EAT held that the ET had no jurisdiction to make the particular costs award.
Segor v Goodrich Actuation Systems Ltd ⁸⁶⁹	EAT	£10,000	The Claimant brought a race discrimination claim but the only evidence of discrimination was that she had not been appointed to roles and others had. The majority of claims brought were out of time and the conduct of proceedings had been unreasonable (breach of confidentiality agreement and the Claimant conceded a point late in proceedings).	Yes; had not conceded point, was sufficient evidence to shift burden of proof and the events complained of were part of a continuing act. Case remitted to the ET to reconsider various issues, including costs.

⁸⁶⁶ UKEAT/0018/08

⁸⁶⁷ [2013] EWCA Civ 1432

⁸⁶⁸ Times, July 3, 1980

⁸⁶⁹ UKEAT/0145/11

Sood v Immigration Advisory Service ⁸⁷⁰	EAT	Amount not specified.	Indirect sex discrimination case. Multiple Claimant were unable to show to the ET that the change in their working hours amounted to a detriment. There was no indication by the ET at a PHR that the Claimants were behaving unreasonably, nor at the interlocutory hearing. After the liability hearing, the ET determined that there had been unreasonable conduct; the Claimants had been legally advised and it was difficult to see that they would not have known that the chance of successfully showing detriment was slim.	Yes. Not a case where costs should properly have been awarded. Losing a case alone is not sufficient to make costs appropriate.
Sud v London Borough of Ealing ⁸⁷¹	Court of Appeal	50% subject to assessment (Respondent's costs over £100,000)	Disability discrimination claim was successful. ET found that proceedings had been conducted in an unreasonable manner; the Claimant had abandoned sex discrimination and race discrimination claims at the last minute, had failed to ensure that witnesses were available to give evidence and had provided late service of expert evidence without permission for that evidence. In addition, the Claimant had failed to consider	No.

⁸⁷⁰ EAT/0153/01

⁸⁷¹ [2013] EWCA Civ 949

			generous offers for settlement and had legal representation for much of the litigation.	
Sutton v Ranch Ltd ⁸⁷²	EAT	Just under £5,500 (to the Claimant)	The Chairman decided to revoke a costs order on review on the basis that the ET did not have jurisdiction to make the costs award. The Respondent had not lodged a response so had been barred from taking any further part in proceedings.	No.
Shodeke v Hill ⁸⁷³	EAT	£450 (split £150/£300 to two respondents)	Costs for the Claimant being late to attend an adjourned hearing (an hour and a half) amounted to unreasonable conduct because no satisfactory explanation was offered for the lateness.	No.
Takavarasha v Newham LBC ⁸⁷⁴	EAT	£1,500	Initially assessed at £7,000 then reduced to £1,500 taking account of the Claimant's means. At an earlier CMD, the ET had found that legally well conceived complaint, but just because a claim has a legal basis does not necessarily mean that it has a sound factual basis.	No.

⁸⁷² [2006] ICR 1170

⁸⁷³ UKEAT/0394/00

⁸⁷⁴ UKEAT/0077/12

Unegbu v Newman Stone Ltd ⁸⁷⁵	EAT	£500 against the Claimant.	Costs because the claim had been withdrawn after the Claimant received an explanation of his treatment through the Respondent's ET3.	EAT set aside - withdrawal alone was not sufficient to establish unreasonable conduct.
Uzoechina v Immigration Advisory Service ⁸⁷⁶	EAT	Costs award £500 (against Claimant)	Unreasonable conduct – the Claimant made untrue allegations about the Respondent.	No.
Vaidyanathan v Milton Keynes Council ⁸⁷⁷	EAT	£10,000 against the Claimant	Unfair dismissal, race discrimination, breach of contract and victimisation claims were all unsuccessful, except a breach of contract claim in relation to holiday pay. The Claimant was unrepresented, but the complaints were misconceived and there was unreasonable conduct (the Claimant sought to pursue claims previously dismissed on withdrawal, made allegations of an active conspiracy and allegations of racial bias by the ET).	No.
Vaughn v Liverpool City Council ⁸⁷⁸	EAT	£100 costs against the Claimant.	Race discrimination and victimisation claims were false and unreasonable. Complaint about working hours became a race discrimination claim with no basis for this.	Appeal dismissed.

⁸⁷⁵ UKEAT/0157/08

⁸⁷⁶ EAT/0992/02, EAT/0108/03

⁸⁷⁷ UKEAT/0670/03

⁸⁷⁸ EAT/344/99

Waterman v AIT Group Plc ⁸⁷⁹	EAT	£10,000 against the Claimant.	The claim was misconceived and out of time. The Claimant had sought to argue about the effective date of termination, but any reasonable person would have known that the correct date was the date as pleaded by the Respondent.	Costs appeal out of time
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⁸⁷⁹ UKEAT/0358/05

<i>Costs Award Made</i>					
<i>Costs Warning Given</i>					
Name	Court	Costs award made	Factors considered	Costs award decision overturned	Should warning have not been given?
Edwards v Marconi Corp Plc ⁸⁸⁰	EAT	£10,000 against the Claimant.	Claims were misconceived and had no reasonable prospect of success. The matter ought to have been settled and the costs were out of all proportion with the seriousness of dispute. The Claimant had been warned by the ET to take advice and warned that £10,000 was the amount that the ET could award without assessment.	Appeal dismissed.	No.
Esan v Medicines Control Agency ⁸⁸¹	EAT	£1,000 against the Claimant.	The Claimant failed to clarify the basis of his claims, included spurious allegations, which the ET had no jurisdiction to entertain and failed to address the issues in the case despite clear direction from the ET to do so. The Claimant had been warned about the possibility	No.	No

⁸⁸⁰ EAT/0397/02

⁸⁸¹ UKEAT/0246/04

			of costs by the Respondent and by the ET.		
Garnes v London Borough of Lambeth ⁸⁸²	EAT	Yes, costs of two days spent at hearing to point abandoned	The Claimant refused to attend the hearing; he was warned that if he did not do so, his claim would be struck out and that he would be at risk of costs.	No.	N/A
Gee v Shell UK Limited ⁸⁸³	Court of Appeal	Claim withdrawn following warning	N/A	N/A	Yes ^{884 885}
Gwara v Mid Essex Primary Care Trust ⁸⁸⁶	EAT	£4,500	Adjournment at the Claimant's request; the costs order was in respect of the Respondent's costs associated with adjournment (£3,000).	Yes – whole case remitted to ET	Yes – given the Claimant may not have been fit to participate in the

⁸⁸² UKEAT/1237/97

⁸⁸³ [2002] EWCA Civ 1479

⁸⁸⁴ "A tribunal should only make costs warnings such as were made in the present case where there is a real risk that an order for costs will be made against an unsuccessful claimant at the end of the hearing.

⁸⁸⁵ Costs award unfair because "[i]t left [the Claimant] in no doubt...that if she continued and lost she was at a real risk of a substantial order for costs being made against her...She simply could not afford to take the risk. There is no doubt that it was this that caused her to withdraw her claim...". In light of the high threshold for costs, the chances of a costs award being made was held by the Court of Appeal to have been remote. However, the ET had thought that there was considerable doubt as to whether Mrs Gee had satisfied the two year service requirement – this seems to be the basis for the costs warning having been given.

⁸⁸⁶ UKEAT/0074/13

					hearing, the question of costs should have been adjourned.
Howman v Queen Elizabeth Hospital King's Lynn ⁸⁸⁷	EAT	£49,052.12	<p>The claim was misconceived as there was no reasonable prospect of success. At CMD, the Claimant was told to carefully consider his position in light of evidence that was presented by the Respondent⁸⁸⁸.</p> <p>The Claimant's household income was £1,257 per month but the ET also took into account the equity that the Claimant had in his family home when assessing his ability to pay.</p>	In part; the EAT upheld the decision that should order costs, that these be on an indemnity basis and that they should be assessed. The issue remitted to the ET was whether the award should be capped.	N/A
Igboji v Tesco Stores Ltd ⁸⁸⁹	EAT	Yes, £1,710.55	The claim was plainly misconceived; the Claimant continued to prosecute putting the Respondent to unnecessary expense to defend the claim. The	No.	N/A

⁸⁸⁷ UKEAT/0509/12

⁸⁸⁸ A letter purporting to be from the Chief Executive of the Respondent was posted on the Respondent's intranet. After investigating, the Respondent discovered that the address from which the letter had been posted belonged to the Claimant's wife.

⁸⁸⁹ UKEATPA/1799/10, UKEATPA/0266/11

			Claimant was given a warning by the Respondent that it would pursue him for costs.		
Jackson v Walsall MBC ⁸⁹⁰	EAT	£10,000	There was no legal basis for the claims that the Claimant was making. The Claimant was a barrister specialising in employment law.	No	No
Kaur v John L Brierley Ltd ⁸⁹¹	EAT	Amount not specified	Unlawful deductions claim which was abandoned. The Claimant failed to identify the loss and tried to make significant amendment to the claim without explaining to the ET or the Respondent what the effect of amendment would be.	No.	N/A
Khan v Kirklees MBC ^{892 893}	Court of Appeal	80% of £100,000 costs (subject to assessment)	Unreasonable conduct of proceedings; the Claimant refused to accept any guidance or direction from the ET and made complaints/accusations of bias against the ET which were the cause of a substantial waste of the Respondent's time. The Claimant	No. Application for permission to appeal refused at CoA	No

⁸⁹⁰ UKEATPA/0283/05

⁸⁹¹ EAT/783/00

⁸⁹² [2007] EWCA Civ 1342

⁸⁹³ UKEAT/0383/06, UKEAT/0578/06, UKEAT/0579/06

			also failed to attend the ET on numerous occasions and the ET gave several warnings that the claim would be struck out. The ET also gave costs warning after an earlier failure to attend.		
Khan v Trident Safeguards Ltd ⁸⁹⁴	EAT	£10,000 to Trident, full costs of proceedings in respect of the other three respondents In relation to a further set of proceedings, £7,800 to Trident	No evidence to sustain the Claimant's claims. In relation to further set of proceedings, the Claimant had failed to adhere to ET case management orders and to attend hearing.	Yes; insufficient reasons for the costs award in relation to the further proceedings.	N/A
Millin v Capsticks Solicitors LLP ⁸⁹⁵	EAT	Respondent's costs on assessment	The Claimant was an experienced employment lawyer; as such, it must have been known to her that her claims were legally misconceived and that there was no evidence to support them.	No	

⁸⁹⁴ UKEAT/0458/02, UKEAT/1413/01, UKEAT/0621/04

⁸⁹⁵ UKEATPA/1010/12

Oko-Jaja v Lewisham LBC ⁸⁹⁶	EAT	£250	Claimant had received a previous cost warning in the first set of proceedings (against same respondent). All material evidence was available to the Claimant	Yes; it was not unreasonable for the Claimant to proceed with the victimisation claim as the employer did not give a full explanation of its actions.	No
Pendragon Plc v Nota ⁸⁹⁷	EAT	One day's costs (against the Respondent)	<p>The Claimant was successful in relation to claims of race discrimination, breach of contract and unlawful deductions but not post-employment victimisation.</p> <p>The hearings were unnecessarily prolonged by the Respondent calling detailed evidence on the Claimant's capability in circumstances where those matters not been raised with Claimant during his employment.</p>	No.	N/A
Simon v British Gas Trading Ltd ⁸⁹⁸	EAT	£7,309 (against the Claimant).	Deposit order (but race claim not characterised as having no reasonable prospect). There was an offer to pay in full (without	In part overturned; quantum changed to £1,500.	No.

⁸⁹⁶ EAT/417/00

⁸⁹⁷ EAT/0031/00

⁸⁹⁸ EAT/0836/02

			admission of liability) in respect of holiday pay and unpaid wages claims. The Claimant refused advice from the ET as to relevance of evidence and chose to pursue the claim nonetheless. The offer to settle was on the basis that no costs were payable; this was made on day one of hearing; the EAT felt that costs were only appropriate in respect of costs incurred after this date.		
Verma v Harrogate & District NHS Foundation Trust ⁸⁹⁹	EAT	Counsel's fee but not solicitors costs.	Case was hopeless; the Claimant had previously been told this and also warned of costs consequences	Yes; on quantum. Should have been the costs of both Counsel and solicitors. Costs to be assessed but capped at £10,000	No

⁸⁹⁹ UKEAT/0155/09

<i>Costs Award Made</i>				
<i>Unclear whether Costs Warning given</i>				
Name	Court	Costs award made	Factors considered	Costs award decision overturned
Lilburne-Byford v Essex CC ⁹⁰⁰	EAT	Nearly £14,000	Proceedings were misconceived and there was unreasonable conduct of the proceedings. A vast amount of time was wasted by the Respondent in responding to unreasonable correspondence. The Respondent wasted hours of ET time by going into irrelevant points despite warnings from ET and had been given at least 10 warnings about the way in which the case was being conducted.	No.
Laing v Partnership in Care (t/a The Spinney) ⁹⁰¹	EAT	£9,000	No details given.	The Respondents did not regard the costs of a contested hearing on the issue as being justified relative to the amount awarded so did not contest the appeal.

⁹⁰⁰ EAT/264/98

⁹⁰¹ UKEAT/0027/09

ANNEX 5: CASES WHERE INTERIM RELIEF SOUGHT

Case Name	Court	Date of termination	Date of application	Date of hearing	Time from termination to hearing	Time from application to hearing
Farmeary v Veterinary Drug Co ⁹⁰²	Industrial Tribunal	1 July 1976	1 July 1976	16 July 1976	15 days	15 days
Brown v G Percy Trentham Ltd ⁹⁰³	Industrial Tribunal	12 June 1976	Not stated	30 June 1976	18 days	N/A
Taplin v C Shippam Ltd ⁹⁰⁴	Employment Appeal Tribunal	25 November 1978	Not stated	15 December 1978	20 days	N/A
Pillay v Inc Research UK Ltd ⁹⁰⁵	Employment Appeal Tribunal	19 January 2010	Not stated	Not stated – claim dismissed by order dated 10 February 2010	22 days (NOTE 1)	N/A
Forsyth v Fry's Metals ⁹⁰⁶	Industrial Tribunal	29 October 1976	Not stated	23 November 1976	25 days	N/A

⁹⁰² [1976] I.R.L.R. 322

⁹⁰³ [1976] I.R.L.R. 279

⁹⁰⁴ [1978] I.C.R. 1068

⁹⁰⁵ UKEAT/0182/11

⁹⁰⁶ [1977] I.R.L.R. 243

Case Name	Court	Date of termination	Date of application	Date of hearing	Time from termination to hearing	Time from application to hearing
Ministry of Justice v Sarfraz ⁹⁰⁷	Employment Appeal Tribunal	1 October 2010	Not stated	28 October 2010	27 days	N/A
Raja v Secretary of State for Justice ⁹⁰⁸	Employment Appeal Tribunal	19 December 2008	22 December 2008	22 January 2009	1 month	1 month, 3 days
Blitz v Vectone Group Holdings Ltd ⁹⁰⁹	Employment Appeal Tribunal	26 September 2008	Not stated	3 November 2008	1 month, 7 days	N/A
Bombardier Aerospace (t/a Short Brothers Plc) v McConnell ⁹¹⁰	Court of Appeal (Northern Ireland)	9 February 2007	15 February 2007	21 March 2007	1 month, 12 days	1 month, 6 days
Miklaszewicz v Stolt Offshore Ltd ⁹¹¹	Court of Session	15 September 2000	Not stated	27 October 2000	1 month, 12 days	N/A

⁹⁰⁷ [2011] I.R.L.R. 562

⁹⁰⁸ UKEAT/0364/09

⁹⁰⁹ UKEAT/0306/09

⁹¹⁰ [2008] I.R.L.R. 51

⁹¹¹ 2002 S.C. 232

Case Name	Court	Date of termination	Date of application	Date of hearing	Time from termination to hearing	Time from application to hearing
Dowling v Ilic (t/a ME Ilic Haulage) ⁹¹²	Employment Appeal Tribunal	15 December 2002	20 December 2001	3 February 2003	1 month, 14 days	1 month, 19 days
Langton v Secretary of State for Health ⁹¹³	Employment Appeal Tribunal	31 march 2013	4 April 2013	Not stated - reasons promulgated on 23 may 2013	1 month, 23 days (NOTE 1)	1 month, 19 days (NOTE 1)
Parkins v Sodexho Ltd ⁹¹⁴	Employment Appeal Tribunal	28 April 2000	Not stated	19 July 2000	2 months, 21 days	N/A
Ayub v Vauxhall Motors Ltd ⁹¹⁵	Industrial Tribunal	3 February 1978	Not stated	Not clear Reserved decision given on 4 May 1978	2 months, 29 days	N/A
Bewry v Cumbria CC ⁹¹⁶	Court of Appeal	28 October 1996	1 November 1996	26 February 1997 to 28 July 1997 (20 days during this period)	3 months, 25 days (NOTE 2)	3 months, 29 days (NOTE 2)

⁹¹² [2004] I.C.R. 1176

⁹¹³ [2014] I.C.R. D2

⁹¹⁴ [2002] I.R.L.R. 109

⁹¹⁵ [1978] I.R.L.R. 428

⁹¹⁶ The Times, 17 November 1998

Case Name	Court	Date of termination	Date of application	Date of hearing	Time from termination to hearing	Time from application to hearing
Benney v Department for Environment and Rural Affairs ⁹¹⁷	Employment Appeal Tribunal	8 December 2009	15 December 2009	5 May 2010	4 months, 28 days	4 months, 21 days

NOTE 1 – where the date of the hearing is not specified but the date on which reasons were given is, the latter has been used in the calculation of the time from termination / application.

NOTE 2 - the date when the hearing began has been used for the purposes of the calculation.

⁹¹⁷ UKEAT/0246/13, UKEAT/0250/13, UKEAT/0251/13, UKEAT/0252/13

Cases where no details of dates of termination or of application

Case Name	Court	Date of termination	Date of application	Date of hearing	Time from termination to hearing	Time from application to hearing
Kirkham v Outward Housing Ltd ⁹¹⁸	Employment Appeal Tribunal	No details given (reference to interim relief having been denied)	No details given (reference to interim relief having been denied)	No details given (reference to interim relief having been denied)	N/A	N/A
Perkin v St George's Healthcare NHS Trust ⁹¹⁹	Court of Appeal	Not stated (reference to claim for interim relief)	Not stated (reference to claim for interim relief)	Not stated (reference to claim for interim relief)	N/A	N/A
Street v Derbyshire Unemployed Workers Centre ⁹²⁰	Court of Appeal	Not stated (reference to claim for interim relief)	Not stated (reference to claim for interim relief)	Not stated (reference to claim for interim relief)	N/A	N/A
Boulding v Land Securities	Employment Appeal Tribunal	No details given (reference to interim relief)	No details given (reference to interim relief)	No details given (reference to interim relief)	N/A	N/A

⁹¹⁸ UKEATPA/1919/12

⁹¹⁹ [2005] EWCA Civ 1174

⁹²⁰ [2004] EWCA Civ 964

Case Name	Court	Date of termination	Date of application	Date of hearing	Time from termination to hearing	Time from application to hearing
Trillium (Media Services) Ltd ⁹²¹		having been denied)	having been denied)	having been denied)		
Dandpat v University of Bath ⁹²²	Employment Appeal Tribunal	Not stated	Not stated	21 July 2009	N/A	N/A
Langton v Secretary of State for Health ⁹²³	Employment Appeal Tribunal	Not stated	Not stated	Not stated	N/A	N/A

⁹²¹ UKEAT/1118/05

⁹²² UKEAT/0408/09, UKEATPA/1284/09, UKEATPA/1285/09, UKEATPA/1391/09

⁹²³ [2014] ICR D2

ANNEX 6: CALCULATIONS RELATING TO SELF-EMPLOYED INDIVIDUALS AND TEMPORARY WORKERS

Self-employed individuals

	January to March 1997	January to March 2015
Self-employed individuals	3,473,000	4,526,000

$$4,526,000 \div 3,473,000 = 1.303$$

Increase of 30.3% from 1997 to 2015

Temporary workers

	January to March 1997	January to March 2015
Agency workers	206,711	328,294
Casual workers	345,335	326,787
Seasonal workers	73,532	70,367
Other	171,279	236,314
TOTALS	796,857	961,762
Fixed term employees	858,330	670,931

Fixed term workers are excluded from these calculations because the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 were introduced after the first set of data (in 1997). As a result of these Regulations, some fixed term employees will have been converted into permanent employees and this may account for the decrease in the numbers in this category of worker.

$$961,762 \div 796,857 = 1.2069$$

20.69% increase from 1997 to 2015

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